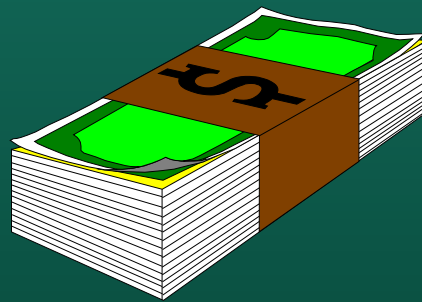


State Public Integrity Commission

Financial Disclosure Reporting
1995 - 2008



STATE PUBLIC INTEGRITY COMMISSION

Financial Disclosure Reporting

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FINANCIAL DISCLOSURE REPORTING

Public Integrity Commission - Synopses of 1995 Opinions

Who Must File?

Public Officers

Financial disclosure reports are to be filed by “public officers.” 29 *Del. C.* § 5813. The statute identifies the specific persons or positions that must file. 29 *Del. C.* § 5812(a)(1)-(18). The rules of statutory construction require that interpretation be consistent with the manifest intent of the General Assembly. 1 *Del. C.* § 301. In determining legislative intent, Courts look first to the statutory language. *Goldstein v. Municipal Court*, *Del. Super.*, C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991). Where the legislature is silent, additional language will not be grafted onto the statute because such action would, in effect, be creating law. *Goldstein* (citing *State v. Rose*, *Del. Super.*, 132 A. 864, 876 (1926)). Where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. *Norman v. Goldman*, *Del. Super.*, 173 A.2d 607,610 (1961). Thus, only the persons/positions identified by the statute must file. (*Financial Disclosure Op. No. 95-001.*)

Honorary State Officials

“Honorary State Officials” are persons who serve as an appointed member, trustee, director or the like of any State agency and who receive or expect to receive not more than \$5,000 in compensation for such service in a calendar year (not including reimbursement of expenses). 29 *Del. C.* § 5804 (2). “Honorary State Officials” are not included within the definition of “public officers” under 29 *Del. C.* § 5812, and therefore are not required to file an annual disclosure report. (*Financial Disclosure Op. No. 95-001.*)

Concurrent Positions

By law, certain officials hold State positions while also holding positions on boards. For example, the State Treasurer is also Treasurer of the Board of Education and the Attorney General is Legal Counsel to the Board. 14 *Del. C.* §§ 106 and 109. Because the State Treasurer and the Attorney General are elected officials, they are required to file based on 29 *Del. C.* § 5812(a)(1), which defines “public officer” as including “any person elected to any state office.” When filing, these

individuals should report any income, reimbursement of expenses, gifts or honoraria received as a result of their position on the Board, if the threshold requirements of value are met for the income, reimbursement or gifts. There is no threshold of value for honoraria. (*Financial Disclosure Op. No. 95-001.*)

When Are Reports Filed?

Filing Deadlines

Not later than 14 days after becoming a public officer. Thereafter, the report shall be filed on February 15 of each year. 29 Del. C. § 5813(c).

Mailing of Report

The Commission does not use the post-marked date as the filing date because the code requires that the form “shall be filed” within 14 days of becoming a public officer and “shall be filed” thereafter on February 15 of each year. The language is silent as to whether a form post-marked within those time frames, but not received by the Commission until after the time frame, is considered as filed. Generally, where the legislature is silent, additional language will not be grafted onto the statute. Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)(citing State v. Rose, Del. Super., 132 A. 864, 876 (1926)). Aside from the language requiring filing within those time frames, the Commission has noted that legislation governing filings by lobbyists specifically authorizes the Commission to accept those filings based on the physical date of filing or the date mailed if sent by registered or certified mail. 29 Del. C. § 5836(a). Because no similar provision applies to filings of financial disclosure forms by public officers, the Commission strictly construes 29 Del. C. § 5813(c). (*Ltr. Op., April 25, 1995.*)

Filing after leaving public office

If a public officer files a disclosure statement on February 15, 1994 and leaves office during that year, must a report be filed on February 15, 1995?

The code requires public officers to file within 14 days of becoming a public officer and on February 15 of each year thereafter. 29 Del. C. § 5813(c). The only reference to what occurs when an individual leaves public office is that the form must be retained on file as long as the person is a public officer, and for at least 5 years thereafter. 29 Del. C. § 5814(a). As the

legislature was silent as to any requirement to file after leaving office, the individual is not required to file the report, because to do so would be to graft additional language onto the statute. *See, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991) (citing State v. Rose, Del. Super., 132 A. 864, 867 (1926))*(generally, additional language will not be grafted onto the statute).

Additionally, in reading the statute in its entirety, it is noted that the legislature found that “persons serving in state government” hold positions of trust and this trust is best preserved if a public official refrains “from acting in his official capacity” where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity. *29 Del. C. § 5811*. By using the terms “persons serving in state government” and “acting in his official capacity” it appears the legislative concern was with persons in office. When the individual has left office, the legislative concerns would no longer be applicable.

Further, the legislature, in the State Code of Conduct, also provided that State employees, State officers and honorary State officials have an ongoing obligation during the course of their employment to avoid reviewing or disposing of matters where there is a personal or private interest, including a financial interest, that would impair judgment. *29 Del. C. § 5805*. “State Officers” encompasses the same persons encompassed by the term “public officer,” except for members of the General Assembly and the Judiciary, whose conduct is governed respectively by the General Assembly’s Ethics Committees and the Code of Judicial Conduct. Thus, for State officers, compliance with the standards of conduct would insure that between the time of filing and the time of termination of employment that the legislative concerns are met. (*Financial Disclosure Op. No. 95-001.*)

What Must Be Reported?

Instruments of Ownership

“Instruments of ownership” valued at more than \$5,000 are to be reported if they are held or constructively controlled by the public officer. *29 Del. C. § 5813(a)(2)*.

Constructively Controlled

Must a public officer disclose financial interests held by a

spouse, even if the public officer holds no stock, receives no direct income from, etc., the spouse's holding?

The code requires disclosure of financial interests which are "constructively controlled," if they meet the threshold value of more than \$5,000. 29 *Del. C.* § 5813(a)(2). "Constructively controlled" means: (1) "A financial interest in the name of another . . . by virtue of any relationship of the public officer to another person and which directly benefits the public officer"; (2) "Any financial interest of a public officer held jointly with the spouse or child"; and (3) "Any financial interest of the spouse or minor child of a public officer." 29 *Del. C.* § 5812(b)(1), (2) and (3)(*emphasis added*). As it pertains to spousal assets, the language is more encompassing than direct benefits; rather, it applies to "any" financial interest.

Also, the purpose of disclosure is to insure the public's confidence that the public officer will refrain from acting in an official capacity on matters in which the public officer has a "direct or indirect personal financial interest" that might reasonably be expected to impair objectivity or judgment; the public officer is to avoid even the appearance of impropriety. 29 *Del. C.* § 5811(*emphasis added*). As the spouse's financial interest might appear to the public to influence the public officer's objectivity or independence, disclosure of the spouse's financial interest would be consistent with the legislative purpose. (*Financial Disclosure Op. No. 95-003.*)

Savings Bonds

Included in the definition of "instruments of ownership" are "debt instruments if convertible to equity instruments." 29 *Del. C.* § 5812 (c). However, the statute does not require "debt instruments having a fixed yield" to be listed "unless convertible to an equity instrument." 29 *Del. C.* § 5813(a)(2).

Bonds are evidence of a debt on which the issuing company or governmental body promises to pay the bondholder a specified amount of interest for a specified length of time. *Black's Law Dictionary*, p. 1612 (5th ed. 1979). Thus, savings bonds are debt instruments having a fixed yield.

"Convertible debt" is debt which may be changed or converted by the creditor into another form of security. *Id.* at

**Individual Retirement
Accounts through Banks**

353. U.S. Savings Bonds are backed by the credit of the government and are not secured with any collateral. *Id.* As there is no collateral backing bonds, they are not convertible into another form of security, and therefore not reportable. (*Ltr. Op.*, March 27, 1995.)

"Instruments of ownership" include "common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments." 29 *Del. C.* § 5812(c). The legislature does not require public officers to report "time or demand deposits in a financial institution." 29 *Del. C.* § 5813(a)(2). "Time or demand deposits" means "checking and savings accounts in banks or deposits or shares in savings and loan institutions, credit unions or money market funds." 29 *Del. C.* § 5812(g). These definitions make no specific reference to bank IRAs.

Generally, under the rules of statutory construction, words are construed to embrace only objects similar in nature to those enumerated by the specific words. 2A *Sutherland Stat. Const.* § 47.17 (5th ed. 1992). Here, bank IRAs are similar to time or demand deposits. First, "time deposits" are "deposits that are to remain for a specified period of time." *Black's Law Dictionary*, p. 396 (5th ed. 1979). It is so called because in theory (not necessarily in practice) the person must wait a certain amount of time to withdraw part or all of the savings. *Id.* at 1330. It is "another term for a savings account in a commercial bank." *Id.* In theory, the bank IRA must not be withdrawn until the beneficiary reaches a set age; although in practice the savings may be withdrawn but only upon penalty. Second, such accounts are usually held in trust by a bank. The Internal Revenue Service (IRS) recognizes such IRAs only if the account meets, among other things, the following criteria: that the trustee of the account is a bank or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of the Internal Revenue Code. *I.R.C.* § 408(a). The IRS defines bank as a bank or trust company incorporated and doing business under the laws of the United States or any state, with a substantial part of the business consisting of receiving deposits or making loans and discounts; an insured credit union; or a corporation which under state laws is subject to

supervision and examination by the Commissioner of Banking or other officer of such State in charge of the administration of the banking laws of such State. *Id.* As bank IRAs are similar to “time deposits,” public officers are not required to report such accounts. (*Ltr. Op., March 27, 1995.*) (*But see, “Mutual Funds,” if IRA is a Mutual Fund investment.*)

Mutual Funds

“Instrument of ownership” does not specifically mention mutual funds, so the rules of statutory construction that like items are to be grouped together applies. *See, 2A Sutherland Stat. Const. §47.17.* Mutual funds are most comparable to “instruments of ownership,” which includes, but is not limited to, common or preferred stock, rights, warrants, articles of partnership, etc. *29 Del. C. § 5812(c).* First, the mutual fund portfolio may include the types of instruments detailed in the statute. For example, the mutual fund may invest in common or preferred stock. Second, the operation of a mutual fund compares with the operation of equity securities; that is, a board of directors determines if dividends are to be paid, in both instances. More important, the instrument holders (shareholders for mutual funds and stockholders for equity securities) have certain rights and privileges that permit them to exercise control over how investments are made. For example, through the exercise of the right to vote, shareholders or stockholders can decide who will serve on the board of directors and thus affect the direction of the company. *Securities Training Corporation Series 7 Training Program (1994).* This exercise of control is not available over “time or demand deposits in a financial institution,” which are not reportable. Thus, mutual funds are reportable if the value is \$5,000 or more. (*Ltr. Op., March 27, 1995.*)

Equitable Ownership/Capital Gains

Must a public officer report as capital gains the selling of inventory for a private business enterprise where the public officer has an equitable ownership interest in the enterprise and reports such ownership interest under *29 Del. C. § 5813(a)(2)*? For example, if the business enterprise sells cars, should the sale of the vehicles be reported under capital gains, separate from reporting the ownership interest?

Public officers must report “any capital gain exceeding \$1,000 from a single source other than from the sale of a

residence occupied by the public officer.” 29 Del. C. § 5813(a)(4)(b). “Capital gain” means capital gains required to be reported to the IRS under federal internal revenue laws. 29 Del. C. § 5812(k). Under the IRS code, capital gains are gains (profit) realized on sale or exchange of a capital asset. *I.R.C.* § 1201 *et. seq.* “Capital asset” does not include stock in trade of the taxpayer or other property of a kind which would properly be included with the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to a customer in the ordinary course of his trade or business. *I.R.C.* § 1221. As the vehicles are held by the corporation (not the individual public officer) primarily for sale to a customer during the course of business, the sales need not be reported by the public officer on the disclosure form as a capital gain under 29 Del. C. § 5813(a)(4)(b). However, because the public officer has an equitable ownership interest in the business enterprise, the public officer should continue to report the ownership interest under 29 Del. C. § 5813(a)(2), as long as the value of the interest exceeds \$5,000. (*Ltr. Op.*, March 27, 1995.)

Income from Rental Property

Must a public officer disclose income from rental properties if the properties are not held by a corporate entity, but are privately owned by the officer?

Legal or equitable ownership in “any business enterprise” valued at more than \$5,000 or producing income in excess of \$5,000 must be reported. 29 Del. C. § 5813(a)(2). “Business enterprise” means “corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession.” 29 Del. C. § 5812(n). The rental of properties owned by the public officer could be considered a sole proprietorship, which is “a form of business in which one person owns all the assets of the business in contrast to a partnership and corporation.” *Black’s Law Dictionary*, p. 1248 (5th ed. 1979). Alternatively, the rentals could be encompassed by that portion of “business enterprise” which includes “any other individual . . . carrying on a business,” as “business” is considered an “activity or enterprise for gain, benefit, advantage or livelihood.” *Black’s Law Dictionary*, p. 179 (5th ed. 1979).

Reporting rental income thus appears consistent with the

broad definition of “business enterprise.” It also appears consistent with the legislative intent noted in the General Assembly’s findings in establishing the requirement for financial disclosure. Specifically, the legislature found that disclosure of financial interests of public officials will serve to guard against conduct violative of the public trust. 29 *Del. C.* § 5811(3). Generally, statutes for public benefit are broadly construed. *See generally*, 3A *Sands*, *Sutherland Stat. Constr.* Chapter 71, (5th ed. 1992).

The Commission also notes that the legislature, in the Code of Conduct, defines “private enterprise” as “any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property.” 29 *Del. C.* § 5804(7). While this definition is in the subchapter dealing with Code of Conduct provisions, the Commission, in reading the legislation as a whole, takes this as some evidence that the legislature intended to include profit from real property within the items that must be disclosed because the concern expressed in both subchapters is that a direct or indirect personal financial interest should not impair objectivity and it found that disclosure was a means of insuring the interest did not impair judgment. *See*, 29 *Del. C.* §§ 5805(a), 5806(b) and 5811(2). (*Ltr. Op.*, April 20, 1995.)

Gifts

“Gift” means “payment, subscription, advance, forbearance, rendering or depositing of money, services, or anything of value unless consideration of equal or greater value is received.” 29 *Del. C.* § 5812(o). Gifts must be reported if they exceed \$250. 29 *Del. C.* § 5813(a)(4)(e). For cabinet secretaries, division directors and persons of equivalent rank within the Executive branch they must annually report gifts in excess of the aggregate value of \$100.00. *Executive Order No. 5, ¶ 1 (a)*. These persons must also notify the Public Integrity Commission of any gift in excess of \$250 within 30 days of receipt. *Executive Order No. 19, amending Executive Order No. 5*. For Executive Order purposes, “gift has the definition set forth in 29 *Del. C.* § 5812(o), and includes meals, travel and tickets to social, theatrical, musical and sporting events unless lawful consideration of equal or greater value is received.” *Executive Order No. 5, ¶ 3. (Financial Disclosure Op. No. 95-004.)*

Campaign Meals

Must a public officer whose spouse is a candidate for public office report the value of meals received at the spouse's campaign fund raiser?

Generally, statutes with a public purpose are liberally construed. *See, generally, 3A Sands, Sutherland Stat. Constr. Chapter 71 (5th ed. 1992)* However, the legislature has specifically declared that a gift from a spouse or relative within the 3rd degree of consanguinity of the public officer or the public officer's spouse is not a gift. 29 *Del. C.* § 5812(o). Thus, if the dinner is a "gift" from the spouse, it would not be reported. However, "gift" could encompass payment of such dinner by others. Therefore, if the public officer's meal is paid for by an organization or person not excluded by the law, the value must be reported if it meets the threshold amount of more than \$250, under 29 *Del. C.* § 5813(e). Such reporting would be consistent with the statutory purpose of disclosure because payment by such organization or person might be perceived by the public as an attempt to influence a public officer in their official capacity, even though the public officer is not attending the function in their official capacity. *See, 29 Del. C.* § 5811 (purpose is to avoid even the appearance of impropriety).

Even if the value of the meal does not reach the threshold amount of \$250, cabinet secretaries, division directors and their equivalent in the Executive Branch, must report the source of the meal if they have gifts in the aggregate with a value in excess of \$100. (*Financial Disclosure Op. No. 95-004.*)

Corporate Meals

Is the value of meals received at a State Chamber of Commerce luncheon reportable where the cost of the meal is paid for by a private enterprise?

The gift should be disclosed under the Financial Disclosure law if the value exceeds \$250. 29 *Del. C.* § 5813(e). For those to whom the Executive Orders on disclosure apply, it must be included in the annual report if the aggregate value of gifts exceeds \$100 during the year. Both the disclosure law and the executive order require identification of the source. 29 *Del. C.* § 5813(4); *Executive Order No. 5, ¶ 4.* The actual provider of the meal should be identified as the source. In

this situation, the private enterprise should be identified as the source.

Reimbursement of Expenses

Are expenses reimbursed by a state agency reportable?

“Reimbursement of expenditures” is defined as “any payments to a public officer for expenses incurred by that public officer.” 29 *Del. C.* § 5812(1). Statutory terms “must be construed according to the common and approved usage of the English language.” 1 *Del. C.* § 303. Here, the code requires that any reimbursement exceeding \$1,000 be reported. The common and ordinary meaning of “any”

includes “every - used to indicate selection without restriction” and “all - used to indicate a maximum or whole.” *Webster’s Seventh New Collegiate Dictionary*, p. 40 (1967). Thus, the term encompasses reimbursements not only from outside sources but also from State agencies. (*Financial Disclosure Op. No. 95-006.*) (*A bill specifically excluding State reimbursements was not passed. H.S. 1 to H.B. 83, lines 29-30, intro. 4/27/83*)

Honoraria

Must honoraria accepted by a public officer and then given by the public officer to a charitable organization be reported?

“Honoraria” means “fees received for speeches, written articles and participation in discussion groups and similar activities, but does not include reimbursement of expenses” 29 *Del. C.* § 5812(m)(*emphasis added*). The term “received” is not defined. Thus, under the rules of statutory construction, it must “be construed according to the common and approved usage of the English language.” 1 *Del. C.* § 303. Both the collegiate dictionary and the law dictionary define “receive” as taking or coming into possession. *Webster’s Seventh New Collegiate Dictionary*, p. 714 (7th ed. 1969); *Black’s Law Dictionary*, p. 1140 (5th ed. 1979). Under the common meaning, the public officer, by accepting the honoraria has taken possession, and therefore, the honoraria must be reported. Where the public officer does not physically accept the honoraria, but directs how or to whom the honorarium is to be dispersed, the public officer is considered to have constructive possession because of the ability to exercise control over the property. A person has constructive

possession if they can “exercise dominion and control over a thing.” *Black’s Law Dictionary*, p. 285 (5th ed.1979). Thus, if the public officer directs the payor to give the honoraria to charity, even without designating a specific charity, the public officer has constructively received the honoraria and must report it. (*Ltr., Op.* , January 27, 1995).

Ownership - Private Home

Must public officers disclose joint ownership in a private home held by the public officer and his or her spouse?

Public officers must report “instruments of ownership.” 29 *Del. C.* § 5813(a)(2). “Instruments of ownership” includes “deeds.” 29 *Del. C.* § 5812(c). Thus, normally ownership of real estate would be reported, even if held jointly with a

spouse, because financial interests that are “constructively controlled” are reported. 29 *Del. C.* § 5813(a)(2). “Constructively controlled” includes financial interests held jointly with the spouse. 29 *Del. C.* § 5812(b)(2). However, owning a private home would not be considered a “business enterprise” and therefore need not be reported. *Ltr. Op.*, December 11, 1995; *But See, Ltr. Op.*, April 20, 1995, *supra* at 7-8(rental income from homes to be reported).

Jointly Held Debts

Must public officers disclose a mortgage held on a private residence when the mortgage is jointly held with a spouse? Must student loans and credit card debts be reported if they are jointly held?

Although the provision requiring reporting of debts, 29 *Del. C.* § 5813 (a)(5), does not specifically refer to joint debts, the purpose of the disclosure is to insure public officers refrain from acting in their official capacity where they have a “direct or indirect personal financial interest.” 29 *Del. C.* § 5811(2). As a joint debtor, the public officer has a direct and personal financial interest, and therefore, the debt is reportable. The fact that it is jointly held does not negate the interest. (*Ltr. Op.*, December 11, 1995).

U.S. Supreme Court Opinion

Honoraria

In February 1995, the U.S. Supreme Court issued an opinion

interpreting federal law governing receipt of honoraria by federal employees. The Ethics in Government Act of 1978 was amended to prohibit members of Congress, federal officers, or other government employees from accepting “any honorarium while that individual is a Member, officer or employee.” The complete ban on honoraria was challenged by certain employees as unconstitutional under the First Amendment’s protection of free speech. The speeches and articles for which respondents had received honoraria in the past concerned matters such as religion, history, dance, and the environment. With few exceptions, neither their subjects nor the persons or groups paying for them had any connection with respondents’ official duties. The Court held that the speculative benefits the honoraria ban might provide the government were not sufficient to justify “this crudely crafted burden” on respondents’ freedom to engage in expressive activities. It therefore violated the First Amendment. The Court limited its

relief to the parties before the Court and declined to redraft the statute to limit its coverage to cases involving a nexus between the speaker’s official duties and either the subject matter of the speaker’s expression or the identity of the payor, believing that it was properly left to Congress to draft a narrower statute. United States v. National Treasury Employees, 115 S. Ct. 103 (1995), 63 U.S.L.W. 4133 (February 22, 1995).

Delaware’s law does not place a complete ban on honoraria. Public officers are to disclose the source of “any honoraria.” 29 Del. C. § 5813(a)(4)(d). The State Code of Conduct prohibits state employees, state officers, and honorary state officials from accepting “other employment, any compensation, gift, payment of expenses or any other thing of monetary value” under circumstances that may result in: (1) impairment of judgment; (2) undertaking to give preferential treatment; (3) making a government decision outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the government of the State. 29 Del. C. § 5806(b). Again, under the Code of Conduct, “state officer” includes the persons defined as “public officers” who are required to file disclosure forms, except for members of the General Assembly and the Judiciary, whose conduct is governed respectively by the General Assembly’s Ethics Committees and the Code of Judicial Conduct. See, 29 Del. C. §1001-1004 and Delaware

Rules Annotated. “*The Delaware Judges’ Code of Judicial Conduct.*”

FINANCIAL DISCLOSURE REPORTING

Public Integrity Commission - Synopses of 1996 Opinions

Who Must File?

Public Officers

“Public Officers” are required to file and are defined in 29 *Del. C. § 5812*.

Deputy Principal Assistants to Cabinet Secretaries

Are deputy principal assistants to Cabinet Secretaries required to file?

Within the Executive Branch, among those who must file are, “all Cabinet Secretaries and persons of equivalent rank” and “all Division Directors and persons of equivalent rank.” 29 *Del. C. § 5812(14) and (15)*.

In previously interpreting the provision pertaining to Division Directors, this Commission held that the rules of statutory construction require interpretations to be consistent with the manifest intent of the General Assembly. *Commission Op. No. 95-001 (citing 1 Del. C. § 301)*. In determining legislative intent, Courts look first to the statutory language. *Id. (citing Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein, January 7, 1991)*. Terms in the statute “must be construed according to the common and approved usage of the English language,” *Id. (citing 1 Del. C. § 303)*, and generally where the legislature is silent, additional language will not be grafted onto the statute. *Id. (citing Goldstein; State v. Rose, Del. Super., 132 A. 864, 876 (1926))*. Also, where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. *Id. (citing Norman v. Goldman, Del. Super., 173 A.2d 607, 610 (1961))*.

In addition to this inference, it is presumed that the General Assembly was aware of such positions as Deputy Principal Assistants to Cabinet Secretaries when it drafted the law as those positions existed at the time, yet the General Assembly did not include them in the list of “public officers.” As they are neither Division Directors, Cabinet Secretaries, nor their equivalent, they are not required to file. (*Commission Op.*

No. 96-06).

Court Commissioners

Are Court Commissioners required to file?

This Commission previously held that because the statute affirmatively identifies certain persons/positions that are to file the financial disclosure form, there is an inference that all omissions were intended by the General Assembly. *Commission Op. Nos. 95-001 and 96-06, supra at p. 1 and pp.14-15.* The Commission noted that when the General Assembly passed the legislation, the particular positions referred to in those decisions were positions of which the General Assembly was presumed to be aware of and could have included in the statutory list had it so desired. *Id.* Those decisions were based on specific inquiries regarding specific positions. The Commission is charged with basing its advisory opinions on a particular fact situation. 29 *Del. C. § 5807(c).*

Here, the Commission understands the Superior Court and Court of Common Pleas Commissioner's positions were not created until July 4, 1994. *See, 69 Del. Laws, c. 420.* Accordingly, when the financial disclosure legislation was passed on July 8, 1983, such positions did not exist. *See, 64 Del. Laws, c. 110.* Thus, the General Assembly would not have been aware of such positions and could not have contemplated them when drafting the financial disclosure legislation.

In considering the quasi-judicial authority given to Court Commissioners, the Commission finds that because many responsibilities of Court Commissioners are similar to the responsibilities of Judges who are required to file, persons occupying Court Commissioner positions should file the financial disclosure form. (*Commission Op. No. 96-03*).

When Are Reports Filed?

Filing Deadlines

Not later than 14 days after becoming a public officer. Thereafter, the report shall be filed on February 15 of each year. 29 *Del. C. § 5813(c).* Although the statute says the report shall be filed on February 15, the Commission will accept reports in advance of that date.

What Must Be Reported?

Instruments of Ownership

Public officers are to report an "instrument of ownership," if the value or income are greater than \$5,000 per year. 29 *Del. C. § 5813(a)*. "Instrument of ownership" includes, but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments. 29 *Del. C. § 5812(c)*.

State Deferred Compensation

The State offers a Deferred Compensation Program to its employees as a voluntary investment plan in which income earned as an employee of the State is set aside for that investment. The choice of investment rests entirely with the participant. The options are to invest in one of several mutual fund programs or to invest in ICMA-Retirement Corporation which deals in government bonds or debt instruments and insurance and annuity contracts. Participants can change investments twice a year.

"Instrument of ownership" does not specifically mention mutual funds. This Commission previously ruled that investments in mutual funds are reportable. *Ltr Op., March 27, 1995, supra at p. 6*. It based that decision on the fact that mutual funds are comparable to the items listed in the definition of "instrument of ownership." *Id.* As the State Deferred Compensation Program is an investment in such funds, if the value is \$5,000 per year or more, the investment must be reported. (*Commission Op. No. 96-68(A)*).

What is Considered Income for Services Rendered?

Child Support

Is child support reported as "income for services rendered?"

The Code defines "income for services rendered" as income from a single source and includes salary, wages, consulting fees and professional services. 29 *Del. C. § 5812(j)*.

In Delaware, child support is decided on a case-by-case basis by the Court based on a statutory scheme that considers, among other things: (1) the health, relative economic condition, financial circumstance, income, including the wages, and earning capacity of the parties, including the

children; (2) the manner of living to which the parties have been accustomed when they were living under the same roof; and (3) the general equities inherent in the situation. 13 Del. C. § 514. If read broadly, since the payment is based on such things as income of the parties and since the support payment is made to the person who is responsible as the care provider for the children, it might be read as “income derived for services rendered.”

However, the Commission considered that under the federal tax laws, payments received as child support are not part of the definition of “gross income.” 26 U.S.C. § 71(c)(1). Under the Delaware tax code, the meanings of terms are the same as those under the federal income tax laws, unless there is a different meaning clearly required. 30 Del. C. § 1101. The Delaware tax laws do not define “gross income” and do not indicate if child support is part of “gross income.” Accordingly, it appears that the federal language would apply and child support would not be considered income under the tax laws.

The Commission concluded child support payments are not reportable as income. (*Commission Op. No. 96-68(B)*).

Worker's Compensation

A candidate for the General Assembly asked if worker's compensation is considered “income for services rendered?”

“Income derived for services rendered” includes salary, wages, consulting fees and professional services. 29 Del. C. §§ 5813(a)(4)(a) and 5812(j).

Worker's compensation is based on personal injury sustained by accident arising out of and in the course of employment. 19 Del. C. § 2304. In calculating worker's compensation, part of the valuation is based on wages. 19 Del. C. § 2302.

“Wages” means “the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident.” 19 Del. C. § 2302. As the definitions in the worker's compensation statute seem to indicate that worker's compensation is, in part, “wages” and therefore would appear to fall within the definition of “income for services rendered,” the source of such income should be

reported if the amount exceeds \$1,000 per year. (*Commission Op. No. 96-68(C)*).

What is a Gift?

Interconnection Between Financial Disclosure Law and Executive Orders No. 5 & 19

The financial disclosure statute defines “gift” as “a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received.” 29 *Del. C. § 5812(o)*. In the Executive Order “gift has the definition set forth in 29 *Del. C. § 5812(o)* [financial disclosure law] and includes meals, travel and tickets to social, theatrical, musical and sporting events unless lawful consideration of equal or greater value is received.” *E.O. 5 ¶ 3*.

Reporting Requirements

The financial disclosure statute requires public officers to file annual reports disclosing, among other things, gifts valued at \$250 or more. 29 *Del. C. § 5814(c) and 5813(a)(4)(e)*. Executive Orders 5 and 19, which apply to Senior Officials in the Executive Branch, require those gifts of \$250 or more be reported to the Commission within 30 days of receipt allowing the Commission to decide if an ethical issue is raised. *E.O. 19*. The executive orders also require that the annual report under the financial disclosure law be supplemented with an addendum identifying gifts with an aggregate value of \$100 or more from a single source. *E.O. 5*.

Travel on Corporate Aircraft

A private corporation gave the services of its aircrew, plus the value of the commercial costs of a round-trip flight to certain State officers and officials to attend a national conference. Some were from the Executive Branch and one was from the Legislative Branch. The value of the travel was \$423.64 per person, round-trip based on standard industry fare. In effect, the company paid the expenses of travel and provided services of value. Thus, the Commission found that the travel fell within the terms of “payment” and/or “services or anything of value” under the definition of “gift” under both the Financial Disclosure statute and the Executive Order. The item would be reported unless there was consideration of equal or greater value.

“Consideration of Equal or Greater Value”

The financial disclosure statute and the Executive Orders exclude items from the term “gift” if “consideration of equal

or greater value is given.” 29 *Del. C. § 5812(o)*; *E.O. No. 5* ¶3. “Consideration” generally means that something is given in exchange. *See, Merriam Webster’s Collegiate Dictionary*, p. 246 (10th ed. 1994)(consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); *See also, 17A Am. Jur. 2d Contracts §§ 113 and 114.*

The Commission understands that: (1) these individuals accepted the travel in conjunction with official participation in a national conference; (2) it was sponsored by two national associations; (3) each State was authorized to bring certain elected officials, one staff member and a leading business executive; (4) additional participants were selected nationwide, including a member of the Delaware General Assembly; (5) the State would otherwise have funded the travel; (6) travel on the same flight gave the participants time to confer and debrief on the conference; and (7) travel on this flight was a time saver for the participants, not only because of the schedules of the government officials, but also because the business executive took time from his vacation to attend because of his active interest in the conference topic.

**“Motive” for accepting gift
is not “consideration”**

The Commission recognized the value of the conference as being important not only to the participants, but also beneficial to the State, in terms of knowledge acquired through their participation. The method by which they arrived at the summit was recognized as being convenient for the participants and a cost savings for the State. However, neither the financial disclosure statute nor the Executive Orders distinguish “gift” based on the purpose of any trip, or on the basis that the method of getting there saves State funds or is more convenient. The motive prompting one to enter an agreement is distinct and different from “consideration.” 17A *Am. Jur. 2d Contracts § 115.*

As the motive for accepting the travel was not “consideration,” and there was nothing indicating that the government participants gave any consideration to the company or the business executive in return for the transportation, the Commission found that the flight was a “gift” and reportable under both the financial disclosure statute and the Executive Orders.

Does acceptance of the gift raise an ethical issue?

Executive Orders No. 5 and 19 require that officials in the Executive Branch to whom the orders apply report gifts of \$250 or more to the Commission within 30 days of receipt for a determination of whether any ethical issues are raised. *E.O. No. 19, p. 2.*

Standard for ethical evaluation

Although the motive for accepting the flight does not impact on the definition of “gift,” those are facts considered when deciding, pursuant to the Executive Order, if a gift raises any ethical issues. *E.O. No. 19, p. 2.* The Executive Orders do not define the standard used for deciding if a gift raises any ethical issues. The Commission applies the State Code of Conduct standard for accepting gifts because it applies to all State employees and State officers. (General Assembly members are exempt as they have their own conflicts law. *29 Del. C. § 1001, et. seq.*) The Code of Conduct restricts state employees, officers or honorary state officials from accepting other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following:

- (1) Impairment of independence of judgment in the exercise of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or
- (4) Any adverse impact on the confidence of the public in the integrity of the government of the State. *29 Del. C. § 5806(b).*

The purpose of the trip, the fact that the method of traveling gave the participants time to confer and debrief regarding the trip, and the fact that the gift saved taxpayers’ money are facts applied to item (4) above and diminish any adverse impact on the confidence of the public. Based on the facts provided, it does not appear the gift would: (1) impair their judgment in exercising official duties; (2) result in preferential treatment to the company or the business executive; or (3) result in government decisions outside official channels; or (4) appear improper.

Conclusion

Thus, because the travel was a “payment” and/or “services or

anything of value,” and there was no “consideration,” it fell within the definition of “gift” under both the financial disclosure law and the Executive Orders. The value of the gift met the threshold amount of \$250, making it reportable under the financial disclosure statute and the Executive Orders. (*Commission Op. No. 96-26*).

Scholarship Paid by Private Enterprise

Is tuition paid by a private enterprise in the form of a scholarship a gift?

A national professional association of government employees in a certain career field offered scholarship opportunities to public employees to attend a course at a university to enhance public administrative skills. The scholarship, valued at more than \$7,000 was for payment of such things as tuition, room, board, etc. The funds for the tuition were contributed by a number of private companies to the national association. The association and the university reviewed applications to decide who would receive a scholarship.

“Gift” includes “a payment” or “anything of value” unless consideration of equal or greater value is received. 29 *Del. C.* § 5812(o). “Consideration” generally means that something is given in exchange. *See, Merriam Webster’s Collegiate Dictionary*, p. 246 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party for an act or promise of another); *See also*, 17A *Am. Jur. 2d Contracts* §§ 133 and 114.

More About “Consideration”

The promise or act given in return for the scholarship is that the recipient agrees to use the scholarship for the purpose outlined in any agreement or understanding. *See e.g.*, 26 *U.S.C.* 117 (IRS definition of scholarship); *Words and Phrases*, Vol. 38 (“scholarship”). Here, the act given in return for the scholarship was to attend the course as a student. The individual was not required to perform any specific services for either the sponsoring association or the contributors or for the State agency at which the individual was employed. The Commission found that while participation as a student was some consideration, it was not equal to or greater than the value received because the individual received the greater value by being provided with the educational opportunity to enhance their skills as a public administrator. Accordingly,

Does acceptance of the gift raise an ethical issue under the Executive Orders?

the tuition was considered a "gift," and as it met the threshold amount, it was reportable.

The individual who received the scholarship was in the Executive Branch. Therefore, the gift was evaluated for a determination of whether the receipt raised any ethical issues, pursuant to Executive Orders No. 5 & 19.

The Commission applied the Code of Conduct standard which restricts acceptance of gifts if it would result in: (1) impaired judgment in exercising official duties; (2) preferential treatment to any person; (3) making government decisions outside official channels; or (4) any adverse impact on the public's confidence in the integrity of the government. 29 Del. C. § 5806(b).

The association offering the scholarship opportunity did not do business with and was not regulated by the individual's agency. The companies contributing to the tuition were not regulated by the agency, but several were vendors. The individual had no personal role in selecting any of those companies as vendors for the agency; and was not aware that any of the contributors had any dealings with the agency, until after attending the course when the individual conducted a search to determine if the State agency had any dealings with any of the contributors. The Commission concluded that the individual could not have given preferential treatment nor had impaired judgment when the decisions were not made by that individual. (*Commission Op. No. 96-52*).

Attendance at a National Conference

Several State officials attended a national legislative organization's conference. The State of Delaware is a dues-paying member of the organization, which fosters communications and cooperation between the States on matters such as policy issues, legislation, etc. It also represents States' positions to the federal government on responsibilities and programs. The national organization has a Board of Directors which raises funds to support the organization's objectives and programs; it sponsors studies, deliberations and publications to provide data on state trends and current developments, etc.

One State official who attended was an officer of the

organization's Board of Directors. The organization pays the Board members' costs of travel, hotel, etc., to encourage them to participate in the organization's efforts throughout the year without the State bearing the costs. The payments were made directly to the hotel, travel, etc., vendors on the individual's behalf.

Board members must perform specific duties as detailed in the organizational by-laws, including attending, participating in, and/or presiding over organizational meetings and seminars. They also participate in numerous planning activities. They are expected to perform substantial duties at the meetings, leaving little free time, and are expected to serve as host at social events. They also must be available to talk about issues during sessions and at other times; lobby federal bodies; visit other States to discuss policies, programs and legislation; file amicus briefs; confer with federal government officials, etc. The individual stated that he had, in fact, actively participated in performing these duties.

Other Delaware officials were attendees at the conference and payment of their expenses was reimbursed by the State through the Interstate Cooperation Commission.

Reimbursement of Expenses v. Direct Payment

Under the financial disclosure statute, "payments" are part of the definition of both gifts and reimbursements. "Gift" means a "payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received." 29 *Del. C. § 5812(o)*. "Reimbursement for expenditures" means "any payments to a public officer for expenses incurred by that officer. 29 *Del. C. § 5812(l)*."

The common and ordinary meaning of "payment" is "the act of paying; something that is paid," and "pay" means "to make a disposal or transfer of money." *Merriam Webster's Collegiate Dictionary*, pp. 853-854 (10th ed. 1994). The organization's policy to cover the expenses of Board members to conduct business falls within the term "payment." However, unlike reimbursements where the "payments" are "to a public officer for expenses incurred by that public officer," the payment for the Board member was made directly to the vendors for travel, hotel, etc.

Was there “consideration” for the gift?

Thus, the Commission viewed payment of the Board member’s expenses as a “gift.” Under the “gift” definition, “payments” are not reported if consideration of equal or greater value is given.

“Consideration” generally means that something is given in exchange. *Merriam Webster’s Collegiate Dictionary*, p. 245 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); *See also*, 17A Am. Jur. 2d *Contracts* §§ 113 and 114.

Here, the exchange was that the individual performed substantial duties in his capacity as a Board member and in return the organization paid certain identified expenses related to performing those duties.

The Commission found “consideration,” because the payment was made in exchange for performing official duties. Further, in this instance, the Commission found that the actual performance of those duties was consideration equal to or greater than the payment of the expenses. Therefore, the individual need not report the paid expenses under the “gift” section.

“Reimbursement” does not encompass “consideration”

For those public officers who were attendees and were reimbursed, the Commission noted that they must report “any reimbursement for expenditures exceeding \$1,000 from a single source.” 29 *Del. C.* § 5813(a)(4)(c)(*emphasis added*).

This Commission has held that the term “any,” which the statute does not define, “must be construed according to the common and approved usage of the English language.” (*Commission Op. No. 95-006*) (citing 1 *Del. C.* § 303), *supra*, at p.10. It held that “any” includes “every - used to indicate selection without restriction” and “all - used to indicate a maximum or whole.” *Id.* (citing *Webster’s Seventh New Collegiate Dictionary*, p. 40 (1967)). In that decision the Commission concluded that “the term [any] encompasses reimbursements not only from outside sources but also from State agencies.” *Id.* As the language does not restrict “any,” by including exemptions the reimbursement is reportable if the amount exceeds \$1,000 from a single source.

This ruling may appear to create an anomaly in that persons who attend the same meeting may end up with different reporting requirements, even though both “gifts” and “reimbursement of expenses” include “payments” within their definitions. Specifically, the direct payment to vendors for the Board member were viewed as a gift, requiring he report the payment if the value were greater than \$250, if there were no consideration. Thus, if the trip were more than \$250 and less than \$1,000, he would report it but the reimbursed attendees would not have to report because the value would not meet the threshold amount for reporting reimbursements. However, in this instance, there was sufficient consideration to remove the payment from being a “gift,” and the Board member does not have to report it regardless of value, but the other attendees would have to report reimbursements from the State if the amount exceeded \$1,000.

Despite the facial appearance of an anomaly, the different definitions require different results. (*Commission Op. No. 96-40*).

Passes to an Athletic Event

An individual received passes to an athletic event and the cost of lodging while attending the event from a friend who was a State employee in another State. The passes permitted attendance for one week and would have cost \$100. However, he was only able to use the passes for two days. The gift provider also informed him that he could bring his spouse or a friend and share the accommodations. He asked how the “value” of the passes and the accommodations were to be determined. He believed that the way in which “value” was defined might effect whether or not his gift was reportable.

What is the “value” of a gift under the Executive Orders?

The Executive Orders under which he reported the gift define “value,” as the price paid for the gift by the source of the gift. *E.O. No. 5, ¶ 2*.

In this situation, the fact that he was only to use the \$100, one-week, pass to the athletic event for two days, did not mean that he did not receive a gift worth \$100. The fact that he was not able to use the passes for the full period does not diminish the “value” of the gift.

Similarly, regarding the hotel accommodations that were provided, the “value” is the price paid. It does not matter that he shared the room with a friend. The individual stated that if he had shared the room with his spouse, he would certainly consider that he had received the full benefit of the room’s “value” and would therefore disclose the full “value.” The Commission concluded that because he could choose anyone to attend the event and have them share the room, regardless of the fact that the individual was not his spouse, he still received the full benefit of the price paid. *See, Ltr. Op., January 27, 1995, supra at pp. 10-11*(an item is received if the individual can exercise domain and control over it).

Who is the “source” of a gift under the Executive Orders?

The individual stated that he received the passes and accommodations from an out of state friend. The friend had obtained the passes from a corporation.

Regarding disclosing the “source,” the Executive Order defines “source” as meaning the same as “person” as defined in 29 *Del. C.* § 5804(6). The Executive Order goes on to state that “source” means any person “who provides a gift to a public officer and includes any group of persons who act in concert to provide a gift to a public officer. *E.O. No. 5* ¶ 4. The Commission held that he should report the gift as being provided not only by his friend but also from the corporate sponsor.

Is an ethical issue raised?

The Commission, under the Executive Orders, is tasked with not only determining for Senior Officials in the Executive Branch if the receipt is reportable, but also determining if the gift raises an ethical issue for them. *E.O. No. 19*. The ethical standard for accepting gifts is whether such acceptance would result in: (1) impairment of judgment in exercising official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse impact on the public’s confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

The friend worked for a State agency in another State and had no affiliations or business with either the individual’s Department or with any Delaware State agency. Additionally, the corporate sponsor had no dealings with either his Department or any agency in the State of Delaware. The

Commission found that the gift did not raise any ethical issue. (*Commission Op. No. 96-28*).

**Charitable Event and
Out-of-State Conference**

A public officer was asked, because of his public position, to participate in a charitable athletic event at no cost to him. The value of being able to participate was approximately \$2,000. Some public officers attended an out-of-state conference which was paid for by a number of entities. The primary sponsor was known to the public officers but not all contributors were known. Although the total cost exceeded \$250, if the costs were split by the entities, none would have paid more than \$250. Are these matters to be reported, and if so, how?

**Who is the “source” and
what is the “value” of a gift
under the Financial
Disclosure statute?**

The financial disclosure law requires that persons report:
“The source of each of the following items . . .

Any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance, the recipient may rely in good faith upon the representation of the source of the gift as to the gift’s value. 29 *Del. C. § 5813(a)(4)(e)*(emphasis added).

**Payment by More than One
Entity**

The first issue is whether the term “source” is limited to a single entity or encompasses multiple entities. The code does not define source. This Commission has previously followed the Delaware rules of statutory construction which require that “words and phrases shall be read within their context and shall be construed according to the common and approved usage of the English language.” 1 *Del. C. § 303*. The common meaning of “source” is “a generative force: cause”; “a point of origin or procurement: beginning” “one that initiates”; “origin.” *Merriam Webster’s Collegiate Dictionary*, p. 1123-24 (10th ed. 1994). While both the language in the statute and the language in the dictionary appear to be phrased in the “singular,” the Delaware rules of construction provide that words used in the singular include the plural and the plural includes the singular. 1 *Del. C. § 304*; *See, State v. Minnick*, *Del. Super.*, 168 A.2d 93 (1960); *State v. Caruso*, *Del. Gen. Sess.*, 32 A.2d 771 (1942); *Application of Pepper*, *Del. Gen. Sess.*, 54 A.2d 173 (1947).

Additionally, in other instances in the financial disclosure

law, the legislature has had no problem making it clear when it wishes to refer to “a single source.” *See, e.g., 29 Del. C. § 5812 (j)*(income means “income from a single source”); *29 Del. C. § 5813(a)(4)(a)*(income from a “single source”); *29 Del. C. § 5813(a)(4)(b)*(capital gain from a “single source”); *29 Del. C. § 5813(a)(4)(c)*(reimbursement from a “single source”). Had the General Assembly meant for the “source” of gifts to be limited to a “single source,” it could have used such term. *See, General Motors v. IAB, Del Supr., 545 A.2d 1186, 1191 (1988)*(where a provision is expressly included in one section of a statute, but omitted from another, it is reasonably to assume the legislature was aware of the omission and intended it.) Also, the statute requires reporting of the source of gifts received from any “person.” Within chapter 58, “person” means “an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.” *See, 29 Del. C. § 5804(6); See also, 1 Del. C. § 302(16)*(in construing all statutes, “person” includes individuals, corporations, etc.) Thus, in the context of gifts, it appears clear that “source” and “person” can include more than one entity.

What is the “value” when payment is by more than one entity?

The next issue is whether “value” is based on the amount paid by each single entity or based on the aggregate amount. The Code provides that “any gift with a value in excess of \$250” is to be reported. *29 Del. C. § 5813(a)(4)(e)*. As indicated above, words and phrases are to be read “in their context.”

1 Del. C. § 303. Read within its context, it is the value of the “gift” itself, not how it was paid for, that is to be reported because the “gift” has the same value whether it is paid for by one person or many. Such interpretation is consistent with the legislative purpose of disclosure. The legislature, in enacting the financial disclosure law, found that:

“[P]ersons serving in State government hold positions of public trust which require rigorous adherence to the highest standards of honesty, integrity and impartiality. In order to insure propriety and preserve public trust, a public official or employee should refrain from acting in his official capacity on any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment, and avoid even

the appearance of impropriety. A disclosure of the personal financial interests of public officials will serve to guard against conduct violative of this public trust and to restore the public's faith and confidence in representatives of its government." 29 Del. C. § 5811.

If a gift were not reported because more than one entity paid for the gift, but the gift had a value that might on the face of it "reasonably be expected to impair objectivity," or if a gift could be accepted and not reported because entities split the costs, the public might well question the point of having a disclosure law because gifts that might appear improper or impact on objectivity could conceivably never be disclosed under such circumstances. It is unlikely that such interpretation would "restore the public's faith and confidence in representatives of its government."

"Sources" of gift unknown

The Commission was asked if the receiver of the gift is required to report gifts when the identity of the givers is not known. For example, in the out-of-state conference situation, one sponsor made it known to the public officers that it, and other unidentified sponsors paid for the trip. Should the recipient attempt to track down all sponsors who contributed?

As indicated above, the legislative concern was that the government official should not act on matters if there is a direct or indirect personal financial interest. 29 Del. C. § 5811. Obviously, if the individual does not know who gave the gift, any personal interest would not impair judgment and it could not result in a decision in favor of the gift giver. However, assuming the individual did not know the identity of all who participated in the gift, "to avoid even the appearance of impropriety," under 29 Del. C. § 5811, the gift's value should be reported with a notation that the giver is unknown. If less than all entities are known, the entities known should be disclosed and it should be noted if unidentified entities contributed. Thus, in the out of state conference situation, the known sponsor should be identified and it should be noted that there were other unknown entities who contributed. The Commission said it did not believe the recipient must conduct personal investigations to determine the identity of all contributors.

Meaning of "Value"

The next issue is another determination of the meaning of "value." The situation given pertains to a charitable athletic event such as the McDonald's Open, where a public official may be invited to appear and play golf.

The first question is whether the recipient should base the value on the fair market value of being able to play golf at that time and place or whether the value is the amount raised per participant and donated to charity. The Code states that the individual is entitled to rely in good faith on the representation by the source as to the gift's value. 29 *Del. C.* § 5813(a)(4)(e). The Code does not define "value."

The rules of statutory construction require that the plain and ordinary meaning of words should be used. 1 *Del. C.* § 303. "Value" means "a fair return or equivalent in goods, services, or money for something exchanged; the monetary worth of something: marketable price; relative worth, utility or importance." *Merriam Webster's Collegiate Dictionary*, p. 1305 (10th ed. 1994). Based on the ordinary meaning, the Commission concludes that "value," under the financial disclosure law, means "marketable price or relative worth." It would be the value paid. Accordingly, the value of the golf event would be what one would have to pay or contribute to participate in the same event. Thus, the full price of a ticket to play in the Pro-Am portion of the McDonald's golf event is its value, not what one would normally pay in green's fees to play at that course.

Consideration of Equal or Greater Value

An item is not a gift if "consideration of equal or greater value is given." 29 *Del. C.* § 5813(a)(4)(e). The question is whether the public officer's time attending such charity event, is the requisite "consideration." The same question applies to the conference: is attendance by General Assembly members and Executive Branch officials the requisite consideration?

"Consideration" generally means that something is given in exchange. 17A *Am. Jur. 2d Contracts* §§113 and 114. It means "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or consideration by the other, as an act of forbearance or the creation, modification, or destruction of a legal relation; or a return promise bargained for and given in

exchange for the promise.” 17 *Am.Jur. 2d Contracts* § 85.

Regarding the golfing event, while the Commission appreciates that it is helpful to charities to have political or other “named” personages on hand, it is also an enjoyable, non-governmental activity for the legislator. Without more, there is not “consideration of equal or greater value.”

Regarding the conference, the agenda showed that while there were some meetings, they appeared to be incidental compared to the majority of time which was not devoted to business. While attending the short meetings was “some” consideration, it was not equal to or greater than the value of the gift.

Conclusion

In summary, the conference trip’s value exceeded \$250. The fact it was paid for by several sources who each contributed less than \$250 does not mean it should not be reported, as it is the value of the gift that is reported. As for reporting the “source,” the individual must report known sources and note the lack of identity of other sources. If they become known, their identity should be reported. And as there was insufficient consideration to remove the trip from the definition of gift, the trip should be reported.

Regarding the golfing event, assuming the cost to participate in the event would be \$2,000, the value exceeds \$250 and would be reported, as there was no consideration of equal or greater value given. (*Commission Op. Nos. 96-07 & 96-33*).

FINANCIAL DISCLOSURE REPORTING

Public Integrity Commission - Synopses of 1997 Opinions

Who Must File?

Appointees to Boards and Commissions

Are gubernatorial appointees to State Boards and Commissions required to file annual financial disclosure reports?

This Commission previously ruled that appointees who receive no more than \$5,000 a year in compensation ("Honorary State Officials") are not required to file annually. *Commission Op. No. 95-001, supra at p. 1*. It subsequently received a number of inquiries regarding whether appointees who make more than \$5,000 per year are required to file on an annual basis. This opinion discusses at length why appointees are not subject to the financial disclosure subchapter.

First, it is noted that when such persons are nominated or re-nominated, the Governor requires them to complete a financial disclosure form and submits a copy to the Senate prior to confirmation. However, for the reasons detailed below, the Commission concluded that while such persons are subject to the State Code of Conduct subchapter, they are not "public officers," and therefore not subject to the Financial Disclosure subchapter's annual filing requirement.

Distinction between the State Code of Conduct and the Financial Disclosure provisions

The State Code of Conduct applies to "State employees," "State officers," and "Honorary State officials." *See, 29 Del. C. § 5804(11), (12) and (13)*. The Code of Conduct gives those to whom it applies "the benefit of specific standards to guide their conduct." *29 Del. C. § 5802(2)*. It specifically addresses rules of conduct to follow not only where there is a financial interest, but where there are other types of interests that may create a conflict. The standards include not only disclosing financial interests under certain circumstances, but restrict participation where there is a financial or other interest which creates a conflict. *See, 29 Del. C. § 5805(a)* (restrictions on deciding matters where a personal or private interest, a close relative, or a financial interest is involved); *29 Del. C. § 5806(b)* (restrictions on accepting compensation, gifts, payment

of expenses, or any other thing of monetary value); 29 *Del. C.* § 5806(c)(restrictions on acquiring financial interests); 29 *Del. C.* § 5806(d) (disclosure of financial interest in any business if it is subject to the regulatory jurisdiction or does business with a State agency). Moreover, it provides rules for other situations that might create conflicts, such as using public office to secure unwarranted privileges, improper disclosure or use of confidential information, etc. *See, e.g.,* 29 *Del. C.* § 5806(e), (f) and (g).

While the Code of Conduct establishes rules of conduct in situations where a conflict exists as a result of financial or other interests, the Financial Disclosure subchapter, on the other hand, is merely a reporting statute. Courts have recognized that such statutes are broadly written; do not devise an objective scheme of relevant and irrelevant interests; do not guarantee the absence of conflicts; and cannot be tailored to the myriad of offices affected because it would be impractical. *Annotation, Validity and Construction of Orders and Enactments Requiring Public Officers and Employees, or Candidates for Office, to Disclose Financial Condition, Interests, or Relationships*, 22 ALR 4th 237, *See also, Senate Report No. 95-170, "Ethics in Government Act," p.42* (federal financial disclosure law applies to "high-level officials in all three branches of the Federal Government. It does not in any way regulate permissible conduct or prohibit the holding of any financial interest.")

Because reporting statutes are broadly written without regard for relevant or irrelevant interests, such reporting requirements have been "vigorously challenged in the courts" as unconstitutional because they are vague, over broad, and/or are an invasion of privacy. 22 ALR 4th 237 § 2. However, Courts have upheld the constitutionality of broad reporting provisions where the statute clearly identifies the persons to whom it applies and where such broad reporting requirements are reasonably relevant to the decision making authority of the persons required to file. *Id. at* § 3 [b]. Where the reporting requirements are applied indiscriminately to persons holding office regardless of the nature of the activities of the agency, with no effort to relate the reporting requirements to the range of the public officers' decision making authority, the Courts have concluded that the reporting requirements can be

“fatally over-broad.” *Id.* at § 3[c]. Conversely, courts have upheld statutes that clearly define the persons to whom they apply and tailor the reporting requirements to elected officials,

high-level officers, and heads of principal departments of state government because “these officials were most likely to become involved in conflicts of interest, since they bore the major responsibility for carrying out the functions of state government and personally participated in the decision making-process.” *Id.* at § 5[a]. Courts have noted that the decision making authority and possibility of conflicts for such persons are “logically of different proportions” than for appointees to State Boards and a requirement for such dissimilar persons to file the same report can be “arbitrarily and unreasonably overinclusive.” *Id.* at 5[b].

The Financial Disclosure Statute Clearly Defines the Persons Who Must File

With those distinctions in mind, a review of the Delaware Financial Disclosure law reveals that the General Assembly provided that “public officers” are required to file the disclosure report. The act then goes on to clearly and unambiguously define “public officer” to be those persons who hold the specific offices listed. *See, 29 Del. C. § 5812(a)(1)-(18)*. It limited “public officer” to include the types of officials who would have major responsibility for carrying out State functions. When the language is clear, a statute must be held to mean what is clearly expressed. *Norman v. Goldman, Del. Super., 173 A.2d 607, 609(1961)*; *Labor's Educational and Political Club Independent v. Danforth, Mo. Supr., 561 S.W. 2d 339, 345 (1977)* (court held that when interpreting financial disclosure statute “it is a well-settled rule of law that the legislature's own construction of its language by means of definition of terms should be followed in interpreting the statute and is binding”).

When no ambiguity exists, and the intent is clear from the statutory language, there is no room for statutory interpretation. *General Motors v. IAB, Del. Supr., 545 A.2d 1186, 1191 (1988)*. Also, Delaware Courts have held that where the persons and things to which the statute refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature. *Norman v. Goldman, Del. Super., 173 A.2d 607, 610 (1961)*. Where the legislature is silent, words will not be grafted onto the statute

The Legislative Intent Expressed by the Clear Language, and the Legislative History, Limits the Persons to Whom the Statute Applies

because to do so would, in effect, be creating law. *Goldstein v. Municipal Court*, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991); *See, Snider v. Shapp*, Pa. Cmwltth, 405 A.2d 602, 612(1979)(court refused to engraft certain appointed officials onto the definition of “public official” in the financial disclosure law because “it would change the plain language”).

Clear and unambiguous statutory language is ordinarily conclusive evidence of legislative intent. *Helfand v. Gambee*, Del. Ch., 136 A.2d 558, 561 (1957). Moreover, the General Assembly is presumed to have known of such appointees and could have included them had it so desired. This presumption is clearly supported by reading the two subchapters in conjunction. In the Code of Conduct, the General Assembly defined the group of persons to whom it applies to cover “State employees,” “State officers” and “honorary State officials.” *See, 29 Del. C. § 5804(11), (12) and (13).*

“State employee” means any person who: (1) receives compensation as an employee of a State agency; or (2) serves as an appointed member, trustee, director or the like of a State agency and receives or reasonably expects to receive more than \$5,000 for such service in a calendar year (not including reimbursement of expenses). *29 Del. C. § 5804(11)(a).*

“Honorary State Official” means a person who serves as an appointed member, trustee, director or the like of any State agency and who receives or reasonably expects to receive not more than \$5,000 in compensation for such service in a calendar year (not including any reimbursement for expenses). *29 Del. C. § 5804(13).*

Thus, appointees to boards and commissions are either “State employees” or “Honorary State Officials.”

The General Assembly separately and distinctly defined “State Officer” in the Code of Conduct as “any person who is required by subchapter II of this chapter to file a financial disclosure statement,” except members of the General Assembly and members of the Judiciary. *See, 29 Del. C. § 5804(12).* [Note: General Assembly and Judicial Members have their own Codes on conflicts. *See, 29 Del. C. § 1001,*

“Legislative Conflicts of Interest,” and The Delaware Rules Annotated, “The Delaware Judges’ Code of Judicial Conduct.”] By classifying appointees as “State employees” or “Honorary State officials,” rather than “State Officers,” the General Assembly recognized a distinction between appointees and those required to file annual disclosure reports. “Where a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume the legislature was aware of the omission and intended it.” *General Motors v. IAB*, Del. Supr., 545 A.2d at 1191. Courts may not engraft on a statute language which was clearly excluded. *Id.*

Not only does the clear language support the presumption that the General Assembly was aware of, but chose to omit, such appointees, but the legislative history shows that legislation was introduced to require appointees to boards such as the Industrial Accident Board, Unemployment Insurance Appeals Board, etc., to file annual reports but the legislation was never passed. *See, H.A. No. 14 to H.S. No. 1 for House Bill No. 83 (June 9, 1983)*. Thus, the legislative history also supports the presumption that the General Assembly was aware of, and could have included, those positions.

To summarize, the General Assembly: (1) clearly defined “public officer”; (2) tailored the definitions to persons with broad-ranging responsibilities in carrying out government functions; (3) recognized the distinction between the decisional authority of high-level officials as opposed to appointees; (4) clearly identified board members as “State employees” or “honorary State officials” as distinct from “State officers” who must file the report; and (5) insured that in fulfilling their more narrow responsibilities that they are governed by conflict of interest rules in the Code of Conduct, including financial conflicts. Accordingly, it would not be consistent with the statutory language, which expresses the legislative intent, for the Commission to graft a requirement on to the disclosure statute for appointees to boards and commissions to file an annual report under the Financial Disclosure statute. Rather, changes, if any, to the classification of persons required to file must be made by the General Assembly. (*Commission Op. Nos. 97-10 & 97-12*).

**“Public Officers” -
Equivalent Positions**

An individual said he works for an agency headed by an elected official, holds a high pay grade merit position, and has substantial responsibilities. He asked if he must file an annual report.

His specific position was not listed under the definitions of “public officer” in 29 *Del. C.* § 5812. The Commission noted that a determination of whether an individual is a “public officer” is not based on whether it is a merit or exempt position or on a specific pay grade or whether the agency is headed by an elected official. Rather, it looks to the statutory definitions to decide if an individual falls within the meaning of “public officer.”

As most categories are very specific, such as candidates, elected officials, judges, etc., the only two categories under which his inquiry could be based are the requirement for filing by: (1) Cabinet Secretaries and their equivalents within the Executive Branch and (2) Division Directors and their equivalents within the Executive Branch. As he was neither a Cabinet Secretary nor a Division Director, the question was whether his position was within the category of “equivalents.”

This Commission's research indicates that there are four (4) positions “equivalent” to a Cabinet Secretary: State Personnel Director, Budget Office Director, Office of Information Services Director and the Delaware Economic Development Office Director. Five (5) positions are “equivalent” to Division Directors: Higher Education Commission Director; State Housing Authority Director; Criminal Justice Council Director; DELJIS Director; and Statistical Analysis Center Director. As he held none of these positions, he was not required to file. However, the Commission noted that he was still subject to the Code of Conduct provisions which address the rules of conduct when there is a financial interest, etc., and in certain circumstances, those provisions specifically require disclosure to the Commission. *See, 29 Del. C.* § 5805(a) and 29 *Del. C.* § 5806(d). (*Commission Op. No. 97-02*).

**“Public Officer” - Principal
Deputy Director**

The Commission previously held that Deputy Principal Assistants to a Cabinet Secretary are not required to file annual disclosure statements under the financial disclosure statute. *See, Commission Op. No. 96-06, supra at pp. 14-15. A*

Principal Deputy Director asked if he were required to file and the Commission concluded that his position was similar to that of a Deputy Principal Assistant, in that they were similarly identified under the personnel statute. *See, 29 Del. C. § 5903(5)*. As the financial disclosure statute defines “public officer” without including such positions, when it is presumed that the General Assembly knew of the positions, especially as they are specifically identified in the personnel statute, the Commission concluded he was not required to file. It did bring to his attention that although not required to file an annual disclosure statement, he was still subject to the State Code of Conduct provisions which, among other things, require filing of financial disclosure statements under certain specific circumstances. *See, e.g., 29 Del. C. § 5805(a) and 29 Del. C. § 5806(d). (Commission Op. No. 97-04)*.

When Are Reports to be Filed?

Filing deadlines - Holidays and Weekends

The statute requires filing within 14 days of becoming a public officer and on February 15 each year thereafter. *29 Del. C. § 5813(c)*. If the due date is on a weekend or holiday, the Commission follows the common law rule that the date due is no later than the first business day after the weekend or holiday. *See, e.g., Associated Transp., Inc. v. Pusey, Del. Super., 118 A.2d (1955)*.

What is to be Reported?

Payment of Expenses by National Organization

An Executive Branch official traveled out of the country for meetings on national and international policies in his area of expertise. His 48-hour trip was paid for by a national association of which the State is a dues-paying member. He had no decision making authority over the association.

The purpose of the trip was to share information on different approaches to issues in his field. The trip was held overseas because the issues are on-going, and it was expected that there will be additional meetings with some occurring overseas and some in the United States, in order to equalize the burden of costs and travel.

The individual was tasked with participating in discussion groups on the Executive Branch's roles in formulating and

implementing policy in the area of concern. Additionally, he was asked to give the international group a detailed explanation of the federal/state relationship in the United States with respect to the matters, and subsequently participate in the preparation of a report on the proceedings.

The association which paid for his trip made direct payments to the vendors, e.g., hotels, air carriers, etc.

He sought a decision on how the direct payments would be treated under the financial disclosure statute. Additionally, under Executive Orders 5 and 19, the Commission was required to determine if accepting the payment of expenses raised any ethical issues as the value exceeded \$250.

The financial disclosure statute provides that "gifts" of more than \$250 are to be reported. 29 Del. C. § 5813(a)(4)(e). "Gift" is defined to include "payment." 29 Del. C. § 5812(o). However, a payment is not a gift, and therefore not reported, if "consideration of equal or greater value" is given. 29 Del. C. § 5812(o).

Meaning of Consideration

"Consideration" generally means that something is given in exchange. Merriam Webster's Collegiate Dictionary, p. 245 (10th ed. 1994) (consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); See also, 17A Am. Jur. 2d Contracts §§ 113 and 114.

The Commission found that because of his obligation to the association to not only participate in the group discussions, but to give a detailed explanation of the federal/state relationship on the issues, and participate in preparing the report, that his participation during the 48-hour trip (including air time) was at least equal to the value received and therefore not to be reported as a "gift."

Was an ethical issue raised by accepting the payment?

Under the Executive Orders, the Commission is charged with deciding if acceptance raises any ethical issues. E. O. 5 and 19. Under the Code of Conduct, restrictions are placed on the receipt of gifts, payment of expenses, etc., if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions

outside of official channels; or (4) any adverse effect on the confidence of the public in the integrity of the State government. 29 Del. C. § 5806(b).

As the individual had no decision making authority over the source of the payment he would have no occasion to render any kind of judgment or make official decisions regarding them, thus he would not be in a position to have his judgment impaired or give them preferential treatment. Additionally, most of his time was spent either in flight or in the meetings; and the meetings related to performing his State position. Accordingly, the Commission found no ethical issues raised. (*Commission Op. No. 97-07*).

Payment by Non-Profit Corporations Who are Reimbursed by a Foreign Entity

A non-profit organization which receives State and federal funding, and some private funding, paid the expenses for a trip out of the country for public officers. The organization was subsequently reimbursed, in part, by a foreign entity's fund. No State or federal funds were used for payment of the trip. Public officers on the trip had some decision making authority over the State funding of the organization.

One of the attendees sought a decision on how the payment should be reported.

The request raised issues not previously addressed by this Commission, such as how a non-profit corporation which receives some State and federal funds is viewed under the statute and how "source" and "value" are determined and reported when a non-profit entity makes direct payments to vendors, and is later reimbursed by a foreign grant program. Accordingly, the Commission addressed these issues at length, and concluded that the payments were to be reported as a "gift" for the reasons given below.

Was the payment a "reimbursement" or a "gift" as both definitions include "payment" as part of their meaning?

Public officers are to annually report "payments" if they are a "reimbursement of expenditures" or a "gift." 29 Del. C. § 5813(a)(4)(c) and (e). Both "reimbursements" and "gift" include "payment" in their definitions. 29 Del. C. § 5812(l) and (o). This Commission has previously noted that including "payment" in both definitions can create anomalies. *See, Commission Op. No. 96-40, supra at 25.* Here, a non-profit entity made direct payments to vendors then was

partially reimbursed through a grant. Thus, the Commission first addresses whether the payments are a “reimbursement.”

(A) Reimbursement discussion

“Reimbursement of expenditures” means “any payments to a public officer for expenses incurred by that public officer.” 29 *Del. C.* § 5812(7). Generally, words and phrases which have a meaning in law are to be construed and understood according to such meaning. 1 *Del. C.* § 303. Such definitions are usually binding. *See, 1A Sutherland Stat. Constr.* § 20.08 (5th ed. 1992) (“when the legislature provides a definition for a term, it is that definition to which a person should conform his conduct”; “when a legislature defines the language it uses, its definition is binding.”) The General Assembly defined reimbursement as “payments to a public officer for expenses incurred by that public officer.” To give meaning to that phrase, as distinct and separate from the meaning of payments under “gift,” the Commission interprets “reimbursement payments” to literally require re-payment to the public officer. This is as opposed to “payments” under “gift” which would encompass direct payments to vendors, etc.

Here, the non-profit corporation paid the expenses for airfare, lodging, etc., directly to the vendors. The public officer did not make payments and seek reimbursement. Rather, the non-profit sought partial reimbursement from a foreign entity through a grant. As the non-profit, rather than the public officer, received the reimbursement, the manner in which the non-profit paid the costs on the officer's behalf would not be a “reimbursement.”

(B) Gift discussion

The Commission next considers whether the non-profit payment is to be reported as a “gift.” Public officers must report “any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of such gift.” 29 *Del. C.* § 5813(a)(4)(e)(emphasis added). A “gift” is “a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received.” 29 *Del. C.* § 5812(o).

(1) Is a non-profit corporation, funded in part by State and federal

The disclosure statute does not define “person.” However, the Delaware rules of statutory construction define “person” as including “corporation, companies, associations, firms,

funds, a person” under the financial disclosure statute?

partnerships, societies and joint-stock companies, as well as individuals.” 1 Del. C. § 302(16). There is no distinction or exemption for non-profit or other private corporations funded in part by a government entity. Those rules also provide that in construing all statutes of this State, the definitions given therein are to be given the meanings provided unless the context requires a different meaning. 1 Del. C. § 302 (emphasis added). In construing statutes using the word “person,” it must be assumed that the General Assembly was aware of the definition in the rules of construction. State ex. rel. Milby v. Gibson, Del. Super., 140 A.2d 774 (1958).

With that assumption in mind, the Commission examines the disclosure statute to see if the legislature intended a different meaning for “person.” To determine intent, the Commission looks first to the statutory language. See, Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991) (in deciding legislative intent, Courts look first to the statutory language). The disclosure statute, just like the Delaware Rules of Statutory Construction, 1 Del. C. § 302(16), has no distinction or exception for a non-profit or any private corporation funded in part by any government entity. Where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. Goldstein (citing State v. Rose, Del. Super., 132 A. 864, 876 (1926)). The Commission finds nothing in the statute suggesting that “person” has a meaning other than the meaning in 1 Del. C. § 302(16). Accordingly, based on the law cited above, the Commission may not graft a distinction onto the statute, and it must conclude that the non-profit corporation is a “person” under the disclosure statute. As the non-profit corporation made the payments, the Commission did not decide if the foreign entity, which partially reimbursed the non-profit company, was a “person” under the statute.

(2) Is the payment of expenses by the non-profit corporation, which is a “person” under the disclosure statute, a “gift” as defined by the financial disclosure statute?

We note first that the common meaning of “gift” is to receive something of value as a present or payment from another person which is absolute, subject to no condition, and which the receiver may do with as he or she pleases. Since the payment by the non-profit corporation of these expenses was subject to conditions, i.e., making the overseas trip for certain expressed purposes and not a thing the public officer could do

with as he/she pleased, such payment would not constitute a "gift" as that term is generally understood to mean.

The statutory meaning of "gift" modifies the term "gift" as a "payment" by providing that receipt of such "payment" need not be reported even if valued in excess of \$250 if "consideration of equal or greater value is received" by the person making the payment. 29 *Del. C.* § 5812(o). Clearly, therefore, the legislature could not have intended that the word "gift" as used in the act should be given its common and accepted meaning, i.e., "do with as you please," because a "gift" is not a "gift" if the donee gives "consideration of equal or greater value" to the donor.

Thus, we conclude that "payment" is the operative word, not "gift" as used in this section of the disclosure statute. Stated another way, receipt of a "payment... or anything of value"... "in excess of \$250" is to be reported "unless consideration of equal or greater value is received." 29 *Del. C.* § 5812(o) and 29 *Del. C.* § 5813 (e) (read together).

With this analysis in mind, it is quite clear to us that based on the facts as disclosed at the hearing, the payment of expenses by the non-profit for the overseas trip, which exceeded \$250, should be disclosed unless consideration of equal or greater value was received in return.

**"Consideration" Means
Giving Something in
Exchange**

Generally, "consideration" as used in contract law, consists of some bargained for benefit or advantage to the promisor, or some loss or detriment to the promisee. *See, Restatement (Second) of Contracts* § 71; *C.J.S. Contracts* § 74, p. 426. On the other hand, a mere promise, without more lacks any consideration and is unenforceable. *C.J.S. Contracts* § 87, pp. 434, 435. In more layman like terms, "consideration" means that something is given in exchange. *See, Merriam Webster's Collegiate Dictionary*, p. 246 (10th ed. 1994). To some extent, there was a form of consideration given by the public officer in making this trip. Certainly, the public officer was under no obligation to go. Also, the daily schedule the public officer was required to keep, attending meetings, seminars and inspecting plants and businesses, left little time to spend on personal activities. In short, this trip was not a vacation junket. Still, the fundamental question which must be

answered is whether there was "consideration of equal or greater value" given in return. This has not been an easy question for us to answer. However, after examining all of the facts presented to us, we have concluded that although some consideration was given, the value received by the non-profit corporation flowed to that organization from its participation in the trip through its representatives who attended, just as the public officer personally, and to some extent the State of Delaware, gained value from the trip.

**"Motivation" is not
"Consideration"**

The purpose of the trip was for Delaware business and government leaders to learn about manufacturing extension, manufacturing networks, technology, development, and technical education efforts in Germany and Denmark and to explore with representatives of the various institutes, laboratories, etc., the opportunities for developing and enhancing similar programs in Delaware. This opportunity to learn about such developments and programs was achieved without the State incurring the costs since the trip was paid by the non-profit corporation. The disclosure statute does not exempt "gift" based on the purpose of the trip; nor is a "gift" exempt from disclosure merely because the State obtained some financial savings by not having to pay for the trip's expense.

No quantified value can be said to have passed to the non-profit corporation from the public officers and the other attendees as consideration for paying these expenses. On the other hand, the value of the trip is to be found in the programs sponsored by the host countries which, in turn, were of benefit to those attending the programs.

**(3) Determination of
"Value" and "Source"**

The disclosure provision requires that the source and value of a "gift be reported if the value exceeds \$250." 29 *Del. C.* § 5813 (a)(4)(e). "Value" is the price paid and the gift retains that value regardless of how many sources actually pay. *Commission Op. No. 96-33, supra* at 27-28. The price paid was approximately \$2,000 per person. The non-profit made the initial payment and was later reimbursed, in part, by the foreign entity's fund, which paid the larger portion of the trip.

The Commission concludes that both sources should be reported to comply with the statutory purpose. The purpose

is to help insure, through disclosure, that public officers refrain from acting in their official capacity on matters where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independence of judgment. 29 Del. C. § 5811. The non-profit corporation does receive some State funding over which the public officer has some decision making authority, even though there was no decision making authority over the foreign entity's fund or over what federal funds were granted to the non-profit or how those funds are spent. This is not meant to cast doubt on the propriety of this trip or how it was funded. Indeed, it could have a beneficial effect for the State of Delaware. Rather, what we are dealing with is whether it is to be reported on the financial disclosure statement.

In considering the purposes of financial disclosure laws, courts have held that although the disclosure requirements are broad, they see no possibility of devising an objective scheme of relevant and irrelevant interests. In re Kading, 235 N. W. 2d 409, *reh'g denied*, 238 N. W. 2d 63 (1975). Rather, courts have held that whatever over-breath may exist should be cured through case-by-case analysis. County of Nevada v. MacMillen, Cal., 522 P.2d 1345 (1974). Limiting disclosure to interests relating only to the government activities where an officer's particular duties lay would not guarantee the absence of conflicts and tailoring requirements for each officer would be an insurmountable task. Snider v. Shapp, Pa., 405 A.2d 602(1979); Fritz v. Gorton, Wash., 517 P.2d 911, *app. dismissed*, 417 U. S. 902, 41 L. Ed. 2d 208, 94 S. Ct. 2596 (1974)(tailoring the act to the many offices affected would be impractical). Uniform disclosure of matters reasonably relevant to the public officer's duties in general are proper. Goldtrap v. Askew, Fla., 334 So. 2d 20 (1976).

Case analysis here reveals that what is reasonably relevant to the duties of the office held by this individual was that the non-profit receives some State funding, even though such funds were not used. Accordingly, reporting that source would appear to fall within the statutory scheme, but reporting only that source could result in the appearance that the entire sum was paid by the non-profit, when the major portion of the costs were paid by a grant over which the public officer had no decision making authority.

Conclusion

For the foregoing reasons, the Commission concludes that the payment is not to be reported as a "reimbursement." It is to be reported as a "gift" because the source is a "person" under the statute and there was not consideration of equal or greater value to remove the payment from the definition of "gift." The value that is to be reported is the estimated \$2,000 and the source to be reported would be both entities that made payments. (*Commission Op. No. 97-01*).

Direct Payments by the State and by Private Employers

I. Background to Ruling

At the Financial Disclosure training sessions given in preparation for the 1997 financial disclosure filings, several persons ask how direct payments by the State or by private employers of individuals who concurrently hold a position as a public officer would be treated under the financial disclosure statute. Based on the legal authority and reasons detailed below, the Commission issued the following general guidelines on January 21, 1997.

(A) Direct Payments by the State:

Where the State expends State funds on public officers to participate in officially sanctioned activities, direct payments by the State under those circumstances are not items subject to the financial disclosure reporting laws under the definition of "gift."

(B) Direct Payments by Private Employers:

Where a private employer pays for its employee to conduct legitimate business activities which the employer has determined are related to that private employer/private employee relationship, such payments are not items subject to reporting as a "gift" under the financial disclosure statute.

The Commission's authority to issue advisory opinions is restricted to "particular fact situations." 29 *Del. C.* § 5807(c) and § 5809(2). To date, no fact situations involving such direct payments have been brought to the Commission for consideration and determination. However, the Commission understood that Public Officers wanted guidance in these areas before filing financial reports in mid-February 1997. While the Commission cannot issue a ruling on a particular fact situation as it has no such situation before it, the Commission has authority to prepare and publish guides explaining the duties of individuals covered by this chapter; and give instructions and materials to facilitate compliance with the statute. 29 *Del. C.* § 5809(9).

Thus, to facilitate the mid-February filing of the financial disclosure report, the Commission issued the above general guidelines and instructions based on the following:

II. Applicable Law

The financial disclosure statute, requires reporting of “gifts” that are valued at more than \$250 received from any “person.” 29 *Del. C.* § 5813(4)(e). The statute defines “gift” as including “payment.” 29 *Del. C.* § 5812(o). However, an item is not a “gift” if consideration of equal or greater value is given. 29 *Del. C.* § 5812(o).

A. Direct Payments by the State

“Person” is not defined in the financial disclosure subchapter subsection. However, “person” is defined under the Code of Conduct as “an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.” 29 *Del. C.* § 5804(7). It separately defines “State” and “State agency.” *See*, 29 *Del. C.* § 5804(9) and (10). Further, the Delaware rules of statutory construction define “person” and “State” separately. 1 *Del. C.* § 302(16) and (18). Those rules require that in construing all statutes of this State, the definitions given therein are to be given the meanings provided unless the context requires a different meaning. 1 *Del. C.* § 302. Courts have held that in construing statutes using the word “person,” it must be assumed that the General Assembly was cognizant of the definition provided in the rules of construction. *State ex. rel. Milby v. Gibson*, *Del. Super.*, 140 A.2d 774 (1958).

With that assumption in mind, the Commission examined the context of the financial disclosure statute to see if the legislature in using the word “person” intended it to have a meaning different than that word as defined in the rules of statutory construction, such that it would include “State.”

Words and phrases are to be read in their context and should reflect the General Assembly’s manifest intent. 1 *Del. C.* § 301 and 303. The intent of the General Assembly, expressed in its findings, is that disclosing personal financial interests will serve to guard against public officials acting in their official capacity on matters where there is a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independence of judgment and avoid the appearance of impropriety. 29 *Del. C.* § 5811. Obviously,

if individuals are employed and paid by the State, they have a financial interest. Payment of expenses related to that employment also conceivably add to that financial interest.

The Commission must assume that payments by the State for travel, etc., are in the legitimate conduct of State business. Courts have recognized that when the government reimburses its employees for participating in official functions that there is a presumption that the employees are then under the “watchful eye” of the agency. *Sanjour v. Environmental Protection Agency*, D.C. App. Ct., 984 F.2d 434,445 (1993) (interpreting the federal ethics provision restricting payment of expenses when performing official duties). In any event, the Commission does not have the authority to review these expenditures and they are a matter of public record.

Further, the public is on notice of the source of that “financial interest” in a number of ways. First, the financial disclosure statute requires public officers to identify the position they hold in the State. 29 *Del. C.* § 5813(a)(1). Further, by defining “public officer” positions that must report information, the decision making level of such persons is addressed by the statute. Additionally, “the source of any income” and “the source ... of any reimbursement” is identified in the financial disclosure report if the threshold amount of more than \$1,000 is met. 29 *Del. C.* § 5813(a)(4)(a) and (e). Thus, the “State” as a source of a “financial interest” is disclosed. Aside from the financial disclosure report which is publicly available, the public has access to additional information on the State as a source of a “financial interest.” For example, the public may obtain the exact salaries, learn of public expenditures, etc., through other publicly available sources. Therefore, the Commission believes the purpose of insuring that the public is aware of the State as a source of the public officer's financial interest is served through these means. The Commission therefore provides the following general guideline: where the State expends State funds on public officers to participate in officially sanctioned activities, direct payments by the State under those circumstances are not items subject to the financial disclosure reporting laws under the definition of gift.

(B) Direct Payment

The Commission again notes the obvious: if the individual is

by Private Employers

employed and paid by a private enterprise it gives rise to a financial interest. If the private enterprise also undertakes to pay the expenses for legitimate business purposes related to the employee's position with the private enterprise, and not as a public officer, that conceivably adds to the financial interest. "Person," as defined under Delaware law, would include such private enterprises.

However, again the Commission notes that the source of income from partnerships, managerial positions in a business enterprise, professional organizations such as the practice of medicine, law, accounting, engineering or other profession, must be reported if the value or income is greater than \$5,000 per year. 29 *Del. C. § 5813(a)(2) and (3)*. Also, the source of income derived for services rendered which includes the source of salary, wages, consulting fees and professional services is disclosed on the financial reporting form if the income exceeds \$1,000 from that source. 29 *Del. C. § 5813(a)(4)(a)*. Thus, the public is informed of the source of the public officer's financial interest which results from employment with a private enterprise. Further, whether there is consideration of equal or greater value given to a private employer when the private employer pays for its private employee (who as a coincidence happens to also be a public officer) to attend functions related to that private employment is not a decision within the purview of this Commission. Accordingly, as a general guideline, where a private employer pays for its employee to conduct legitimate business activities which it has determined are legitimately related to that private employer/private employee relationship, such payments are not items subject to reporting as a "gift" under the financial disclosure statute. (**Guidelines for Public Officers, January 21, 1997**).

State Payment for Leadership Course

The State contracts with a private company for a leadership course which public officers attend. The State pays the course costs either by reimbursement or a direct payment. Does the public officer report the payment of expenses?

Cabinet Secretaries, agency heads, Division Directors, program managers, and other top executives attend the program. Some of these are "public officers" under the financial disclosure law; this opinion applies to those persons.

See, 29 Del. C. § 5812(a). If attendees want to know if they are “public officers,” they may review 29 Del. C. § 5812, and if needed, request an advisory opinion from the Commission.

“Payments” are reported if they are “reimbursements” or “gifts.” See, 29 Del. C. § 5812(l) & (o); § 5813(a)(4)(c) & (e).

Most attendees have the payment for the program, hotel, meals, costs of training, course materials, etc., paid by Interagency Voucher. Those payments are direct payments, not reimbursements. Thus, they are “direct payments by the State,” and consistent with the Commission's guidelines issued January 21, 1997, such payments are not reported as “gifts.” See, Guidelines for Public Officers, “Direct Payments by the State,” (January 21, 1997) *supra* at 47-49.

Transportation costs are paid by the individual, who may seek reimbursement. As the financial disclosure law requires reporting of reimbursements from “any source,” State reimbursements are included. See, Commission Op. No. 95-006, *supra* at p. 10. Accordingly, if public officers are reimbursed more than \$1,000 by the State in a calendar year, the State of Delaware is listed as the “reimbursement” source.

The statutory language appears to create an anomaly as State officers report State “reimbursements,” but not direct payments by the State as “gifts.” However, the different statutory definitions require different results. Commission Op. No. 96-40, *supra* at 23-25. “Reimbursements” from “any source” are reported; “gifts” from “any person” are reported. “Person” has a legal meaning that does not include the State.

See, Guidelines for Public Officers, “Direct Payments by the State,” (January 21, 1997) *supra* at 47-50. (Commission Op. No. 97-05).

STATE PUBLIC INTEGRITY COMMISSION

Synopses of 1998 Financial Disclosure Decisions

Jurisdiction

Local Government Financial Disclosure Reporting

A local government had adopted its own Code of Conduct, which was reviewed and approved by the Commission to be at least as stringent as the State Code of Conduct. *68 Del. Laws, c. 433 § 2*. Subsequently, it adopted a Financial Disclosure ordinance. It asked if the Financial Disclosure ordinance needed to be reviewed by the Commission.

The Commission held that, the Act requiring that local governments have their codes reviewed by this Commission clearly and specifically refers only to "Code of Conduct" legislation, which is "Subchapter I" of Chapter 58, Title 29. *See, 68 Del. Laws c. 433 § 2*. It does not refer to "Subchapter II" on "financial disclosure." Thus, any review by this Commission of local government codes would be limited to that government's Code of Conduct provisions. While local government Codes of Conduct would include provisions relating to financial disclosure similar to those in the State Code of Conduct, e.g., *29 Del. C. § 5806(d)*, in order to be as stringent as the State Code, it would be those provisions--not the annual reporting provisions--which this Commission would review and approve. (*Commission Op. No. 97-24*).

What is to be Reported?

Payment of Foreign Travel Expenses

A State officer, and persons from other States in similar positions, traveled to a foreign country to participate in meetings to enhance understanding with the foreign government on cultural, economic and political affairs, with a specific emphasis on government issues handled by his agency and similar agencies in the other States. The foreign government paid the travel expenses.

The official spent approximately six days overseas, and while there, actively engaged in attending meetings with various officials of the foreign government. He was expected to not only attend the meetings, but required to give information and

a presentation on the Delaware laws which his agency enforced, with particular focus on certain specific Delaware

laws. The agenda and his statements at the Commission's meeting showed that he was actively engaged in performing government related duties during the visit.

**"Gift" Includes
"Payments"**

The financial disclosure law defines "gift" to include "payments." 29 *Del. C.* § 5812(o). Payments are reported if the value exceeds \$250, but only if there is not consideration of equal or greater value. 29 *Del. C.* § 5812(o) and § 5813(a)(4)(e). He spent approximately six days overseas. While there, he actively engaged in meetings with foreign government officials. He was expected not only to attend the meetings, but required to give information and a presentation on Delaware laws enforced by his agency. His agenda and comments at the Commission meeting showed he was actively engaged in government related duties during the visit. Accordingly, his participation, with little or no recreational or sight-seeing activities, constituted consideration of equal or greater value. Thus, the payment is not a "gift."

**Were any Ethical
Issues Raised?**

Executive Orders 5 and 19 require Senior Executive Branch Officials to report payments of more than \$250 within 30 days of receipt so this Commission can evaluate the payment to decide if acceptance raises any ethical issues. *E.O. 19* ¶ 2. The Code of Conduct restricts State employees and officers from accepting payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) an appearance of impropriety. 29 *Del. C.* § 5806(b).

As he had no decision making authority over the foreign government in his official capacity, his judgment would not be impaired nor would he be in a position to give that government, or members thereof, any preferential treatment. Further, the purpose of the trip and his active participation in performing duties related to his official functions did not raise an appearance of impropriety. (*Commission Op. No. 97-42*).

**Reimbursements Paid by
Another State**

A member of the Executive Branch was asked to come to another State to serve as a judge in a competition which it was

hosting. The other State reimbursed her expenses.

**Threshold Amount
for Reimbursements**

The threshold amount for disclosing reimbursements is if the value exceeds \$1,000 from a single source in a calendar year. 29 Del. C. § 5813(a)(4)(c). As the other state's agency

reimbursed her for an amount of less than \$1,000, the reimbursement did not meet the threshold amount for reporting.

**Were any ethical
issues raised?**

Pursuant to the Executive Orders that require the Commission to decide if acceptance raises any ethical issues, the Commission applied the Code of Conduct, which restricts State officers from accepting a payment or anything of monetary value if it may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 Del. C. § 5806(b).

Here, she had no decision making authority over the other state's agency that reimbursed her, or over any companies that competed for the award. Also, neither the other state's agency, nor the companies she was judging, had any business dealings with her agency. Thus, it did not appear that she would be in a position to have her judgment impaired, nor to give either the agency or the competitors any preferential treatment. The other state's agency invited her to be a judge in the competition principally because of her official position and expertise in the particular area. In those circumstances, such action did not raise any appearance of impropriety. (*Commission Op. No. 97-43*).

**Airline Tickets Won in
Drawing**

A State officer put her business card in a hat at a social function. When the drawing was held, her card was selected and she won two tickets from an airline company for a trip overseas.

**Report any gift worth more
than \$250**

The financial disclosure statute requires Public Officers to report the source and value of any gift received which is worth more than \$250 on their annual financial disclosure report. *See*, 29 Del. C. § 5813(a)(4)(e). Also, under Executive Orders No. 5 & 19, certain Senior Executive Branch officials

must file: (1) an addendum to the annual report reflecting any gift with an aggregate value in excess of \$100, and (2) notice with this Commission within 30 days of receipt of any gift worth more than \$250, so the Commission can decide if acceptance raises any ethical issues. *E. O. No. 5* ¶¶ 1 & 2; *E. O. No. 19*, ¶ 5th “Whereas,” and ¶ 1.

The airline tickets were a “gift” as defined by the financial

disclosure law because “gift” includes accepting “anything of value” unless “consideration of equal or greater value is received.” Here, she merely put her business car in the hat for the drawing; she gave nothing in exchange for the tickets. As the value of the tickets was more than \$250, the source and value would be reported under the financial disclosure statute.

Were any ethical issues raised?

To decide if accepting a gift raises an ethical issue, the standard applied to officers in the Executive Branch is whether acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) government decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of the government of the State. 29 *Del. C.* § 5806(b).

The State officer had no decision making authority, or in fact, any dealings with the airline in her official capacity. Moreover, her business card was selected at random from all business cards that were put in the hat. Accordingly, the Commission found no ethical issue raised by accepting the tickets. (*Commission Op. No. 97-33*).

Jewelry from a Foreign Government

A Senior Executive Branch official received two items of jewelry from visitors from a foreign government. The visitors were part of an exchange program with the foreign government. They presented the items at a public presentation as a token of appreciation to the State officer for hosting them during their visit.

de minimis gifts

The financial disclosure statute requires reporting the source and value of gifts worth more than \$250 on the annual report. 29 *Del. C.* § 5813(a)(4)(e). The jewelry was a “gift” as defined by the financial disclosure law because “gift” includes

accepting “anything of value” unless “consideration of equal or greater value is received.” 29 *Del. C.* § 5812(o). Here, she received the items from the foreign visitors who were here as part of an exchange program and she gave nothing in exchange for the items. Rather, they were a complimentary gesture, given in a public presentation, as an expression of appreciation for performing her State duty of hosting the visitors. Performing that duty was not contingent on receiving a gift. While the Commission found that the jewelry was a “gift,” after seeing the two items, it concluded that the value was *de minimis*--less than \$5.00 each. Therefore, the value did not reach the reporting threshold amount of \$250.

Were any ethical issues raised?

As she was an Executive Branch officer, the State Code of Code provision regarding accepting gifts was applied to decide if any ethical issue was raised by acceptance. The Code restricts acceptance if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment of any persons; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in its government. 29 *Del. C.* § 5806(b).

Here, her agency was involved in the exchange program with the foreign government. Thus, she may have some decision making authority regarding the program and persons from the foreign government who participate. However, as previously noted, the value of the jewelry was *de minimis* and, factoring in the circumstances under which it was given, the Commission found that acceptance would not result in impaired judgment, preferential treatment, official decisions outside official channels or adversely effect the public’s confidence. Thus, no ethical issue was raised by accepting the jewelry. (*Commission Op. No. 97-33*).

Attending Athletic Events

State officers notified the Commission that they had accepted an invitation to an athletic event from a private enterprise. They attached a per-person break down of the value of attending and participating in the event, and pointed out that they did not receive all items listed, such as the breakfast and a plaque. They believed the “value” of the gift was appropriately reduced by the amount of the items not received. The Commission has previously ruled that:

Meaning of “Value”

“value” means “a fair return or equivalent in goods, services or money for something; marketable price; relative worth, utility or importance.” *Commission Op. No. 96-33, supra at p. 30*. In that opinion, the Commission held that the “value” received when participating in an athletic event is what one would have to pay or contribute to participate in the event. Thus, to the extent that the costs to participate would include the costs for such items as plaques, breakfasts, etc., it appears that the “value” would not be reduced just because the individual did not personally partake of those items. (*Commission Op. Nos. 97-38 and 97-39*).

“Forbearance” as a “Gift”

A State official asked the Commission if she needed to report the value of attending a seminar where a private company asked her to serve as a panelist at one session of the seminar. If she served as a panelist, she would not be required to pay the registration fee. The private company also paid the travel and accommodation expenses.

The financial disclosure statute requires that “gifts” valued at more than \$250 must be reported. 29 *Del. C.* § 5813(a)(4)(e). “Gift” is defined to include “payment” and “forbearance.” 29 *Del. C.* § 5812(o). Obviously, the airfare and hotel are “payments.” “Forbearance” means “refraining from the enforcement of something (as a debt, right or obligation) that is due.” *Merriam Webster’s Collegiate Dictionary*, p. 455 (10th ed. 1994). As the company refrained from enforcing payment of the registration fee, it would constitute “forbearance.” Accordingly, the total value received from the company for the travel, accommodations, and registration fee, would be reported, unless there was consideration of equal or greater value given.

The term “gift” specifically excludes the need to report if “consideration of equal or greater value” is given. 29 *Del. C.* § 5812(o). As there was not enough information available for the Commission to decide if sufficient consideration was given to remove it from the term “gift,” the Commission advised her that she could provide the facts and receive an advisory opinion on whether there was consideration of equal or greater value. (*Commission Op. No. 98-13*).

Honoraria

A candidate for State office asked if a payment for writing an

article should be reported as "income for services rendered" or "honoraria."

Both types of payments result from services rendered. However, there is a legal distinction between the two. "Honoraria" is payment in consideration of services which admit of no compensation in money," but are "voluntary payments for which no remuneration could be collected at law." *Black's Law Dictionary*, p. 663 (5th ed. 1989). On the other hand, salary and wages can be collected at law, and the payment under such circumstances arises generally from what normally constitutes an employer-employee relationship with the distinction between them being that "salary" is paid for a fixed period such as a year, month, etc., while "wages" are normally based on an hourly rate. *Id.* at 1200.

Here, the payment was more in line with "honoraria." First, the fee was received for a "written article." The definition of "honoraria" specifically includes such items. 29 *Del. C.* § 5812(m). Second, the relationship between the payee and payor was basically voluntary in nature. That is, individuals could volunteer to serve on an advisory board and to apparently encourage volunteers to write articles, the payor would pay \$50.00 for an article. However, there appeared to be no requirement for the payment and no means of enforcing payment.

Because the payment fit within the clear terms of the definition of "honoraria" and because the payment arose from a voluntary relationship, the Commission concluded that it should be reported as "honoraria." (*Commission Op. No. 98-24*).

Corporate Aircraft Travel

A State officer and members of his staff used a corporate aircraft to travel to a conference. The Commission held that it was a "gift," as defined by the financial disclosure statute, as no facts indicated any consideration of equal or greater value. *See*, 29 *Del. C.* § 5812(o).

Were any Ethical Issues Raised?

As the Public Officer was a member of the Executive Branch, the Commission reviewed the Code of Conduct to decide if any ethical issues were raised by acceptance. The Code of Conduct restricts state employees, officers or honorary state

officials from accepting other employment, any compensation, gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) impairment of independence of judgment in the exercise of official duties; (2) an undertaking to give preferential treatment to any persons; (3) the making of governmental decisions outside official channels; or (4) any adverse effect on the confidence of the public in the integrity of the government of the state. 29 Del. C. § 5806(b).

This is the second of two opinions regarding state officials using transportation provided at no cost by private companies. See, Commission Op. No. 96-26, supra at 18-21. The

Commission found that it was reasonable for the public officer to rely on Opinion No. 96-26 in determining that use of the corporate jet would not violate the Code of Conduct.

Both uses were similar in that the trips were for public purposes which benefitted the State of Delaware; the use of the private jet satisfied a justifiable expedited transportation need and the use of the corporate jet saved the state money.

However, the Commission cautioned that the trips did differ. For example, each company had different relationships with the State; the trips were scheduled differently (in No. 96-26, the company was making the trip because one of its directors was participating in the conference); and the more recent flight was catered. The reason for pointing out the differences in the two cases was to emphasize that the Commission's conclusions must be based on the specific facts of each matter before the Commission.

It advised the officer not to construe the opinions as blanket approval for any other use of corporate aircraft. The fact that use of a private jet saves taxpayers money is but one factor considered. Any future use of corporate aircraft could, depending on the specific facts and the cumulative effect, result in a different conclusion by the Commission if the public perception could be that a government official may become beholden to the private interest supplying the jet or that a government official may be using public office for

private gain, which is prohibited by 29 Del. C. § 5806(e). (*Commission Op. No. 98-29*).

Award from Professional Association

A state officer was nominated and selected for an award from a professional organization. The basis for selection was to recognize, among other things, his career dedication to public service. He received a statuette and a complimentary registration to attend the organization's meeting. As statuette and registration were valued at more than \$250, they were to be reported as gifts under the financial disclosure statute, as no facts indicated that he had given the organization consideration of equal or greater value.

Were any ethical issues raised?

To decide if accepting a gift raises any ethical issue for members of the Executive Branch, the Commission applies the Code of Conduct standard which restricts State officers from accepting gifts or anything of monetary value if it may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

The officer was a member of the association and was nominated for the award to recognize his career dedication to government service; sustained outstanding contributions; exemplary public management; professionalism; excellence and positive awareness of public administration. The nomination was by another association member who also worked for a Delaware agency.

In his State position, the officer had no decision making authority over the association. Thus, it did not appear that his judgment would be impaired or that he was in a position to give the organization preferential treatment or make official decisions outside official channels which would benefit the organization.

There was an official relationship between the agency where the nominator worked and the State officer. The officer chaired a State committee which had awarded a contract to the nominator's agency. The contract was managed by the recipient's department. It was awarded before the officer was

nominated for the award. The nominator was one of the principal persons responsible for the contract, and his contribution as part of the "in kind" resources in the contract. A student, whom he supervised, was paid out of the contract. None of these facts constituted a violation of 29 *Del. C.* § 5806(b). (*Commission Op. No. 98-27*).

Tickets to Sports Events

A State officer received tickets to two sporting events from a company which was regulated by the State. As the tickets were valued at more than \$250, the source and value of the tickets was to be reported, as no facts indicated that the officer had given any consideration in return for the tickets.

Were any ethical issues raised?

State officers are restricted from accepting gifts or anything of monetary value if acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

His official duties did not involve any decisions regarding the regulation of the private enterprise. His official duties did require him to develop and execute strategies as part of the State's interests in insuring jobs in the public sector in companies of this type. In essence, his official duties required him to "court" the industry to protect jobs and recruit jobs from the industry for the State.

While the company, like other similar companies, would have an interest in the strategies he was required to develop and execute, he had not worked on any development project for this company within the last 12 months, nor were there any projects pending. Thus, it did not appear that the gifts would affect his judgment on any official decision or result in any type of preferential treatment for the company.

The Commission emphasized that his State position was unique from most State positions because of the need to "court" private enterprises. Thus, issues regarding appearances of impropriety when a State employee accepts gifts from private enterprises are different because of the unique operations of his office, which were mandated by statute. Accordingly, the Commission found no violation of

the Code of Conduct. (*Commission Op. No. 98-26*).

Tickets from State Agency

The statute requires that gifts from any “person” valued at more than \$250 must be reported unless consideration of equal or greater value is received. 29 Del. C. § 5813(a)(4)(a). The Commission has ruled that when a State agency provides payment for State officers, that such items are not matters to be reported as a “gift” because the financial disclosure statute requires that “gifts” from any “person” must be reported. *See, Guidelines for Public Officers, “Direct Payments by the State,” January 21, 1998*. The Commission reached that conclusion because “person” has a specific statutory definition, which does not include “State agency,” “State agency” is clearly and separately defined; and had the General Assembly wished to include “State agency”

within the definition of “person” it could have done so. *Id.* “State agency” is defined to include *public bodies existing by virtue of an act of the General Assembly...* 29 Del. C. § 5804(10)(emphasis added).

For Purposes of Financial Disclosure, the Riverfront Development Corporation is a “State Agency”

Here, the tickets were received from the Riverfront Development Corporation (RDC). The RDC resulted from legislation in a Bond Bill passed in June 1995 (*S.B. No. 260*). In that legislation, the General Assembly authorized the Governor to incorporate along with the New Castle County Executive and the Mayor of Wilmington a Riverfront Development Corporation. Read literally, the RDC resulted from an act of the General Assembly. Moreover, in the legislation, the General Assembly stated that the RDC “*is to assist and cooperate in capital development and public works programs funded in conjunction with other governmental agencies.*” The implication of that language is that the RDC may be considered a governmental agency for certain purposes. Thus, we conclude that the RDC is a “State agency” as defined by the State Code of Conduct.

We are aware that the Attorney General’s office concluded that the RDC is not a “State agency” for purposes of applying prevailing wages provision of the procurement law.

However, the procurement law has its own distinct definition for “agency.” We further note that it is possible for an entity

to be a "State agency" for some purposes but not others. *See, e.g., Skomorucha v. Wilmington Housing Authority, D. Del., 504 F. Supp. 831 (1980); Wilmington Housing Authority v. Williamson, Del. Supr., 228 A.2d 782(1967); See also, Atty. Gen. Informal Op. No. 93-I018 (July 21, 1993; Atty. Gen.Op. No. 79-F013(November 30, 1979).*

Accordingly, since the RDC falls within the Code of Conduct's definition of "State agency" the tickets need not be reported. Moreover, the Commission has no authority to review expenditures by State agencies. *See, Guidelines to Public Officers.* Therefore, any question regarding whether an ethical issue is raised is not within the Commission's jurisdiction. (**Commission Op. No. 98-28**).

STATE PUBLIC INTEGRITY COMMISSION

Financial Disclosure Reporting - Synopses of 1999 Opinions

What Must Be Reported?

**Is a Life Insurance Policy an
“Instrument of Ownership”?**

The Public Integrity Commission was asked if life insurance policies with a face value of more than \$5,000 are to be reported as “instruments of ownership” on the financial disclosure report. The policy referred to was one in which an individual pays premiums and payment of the face value amount will be made to beneficiaries upon the demise of the individual. No income is being received from the policy.

**SUMMARY
CONCLUSION:**

Based on the following law and facts, such policies are not to be reported as instruments of ownership.

APPLICABLE LAW:

The statute defines “instrument of ownership” as: “includes, but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deed and debt instruments, if convertible to equity instruments.” 29 *Del. C.* § 5812(c).

Did the General Assembly intend to include life insurance policies in:

- (A) the specifically listed items; or
- (B) its admonition that the definition was “not limited to” those specific instruments?

ANALYSIS:

Statutory interpretation must be consistent with the General Assembly’s manifest intent. 1 *Del. C.* § 301. To determine legislative intent, Courts look first to the actual language and if there is any ambiguity, reference may be made to the usual secondary sources of statutory construction. *Chrysler Corp. v. State, Del. Supr.*, 457 A.2d 345, 351 (1983).

**(A) Is a life insurance
policy a specifically
listed instrument of
ownership?**

The only specifically listed instruments which might include insurance policies are “warrants” or “rights.” In decisions on statutory construction other statutes have relevance as precedent if both statutes are such closely related subjects that consideration of one naturally brings to mind the other. *Sutherland Stat. Constr.* § 45-15, Vol 2A (5th ed. 1992). Here, the statutes that come to mind are Delaware statutes on:

(1) Is a Life Insurance Policy a "Warrant"?

(1) life insurance policies and (2) investments.

First, in Delaware, life insurance policies are contracts. 18 Del. C., Chapter 29. Life insurance contract "warrants" were recognized at common law in Delaware. Baltimore Life Ins. Co. v. Floyd, Del. Super., 91 A. 653 (1914), aff'd, Del. Supr., 94 A. 515 (1915). However, when the General Assembly codified the common law, it clearly stated that the information on which life insurance policies were based was not to be a warrant. 18 Del. C. § 2711.

Second, in investment and security statutes, the General Assembly recognized life insurance policies as an investment separate and distinct from warrants. See, 12 Del. C. § 3302(b)(fiduciaries may acquire "every kind of investment ...including but not by way of limitation...stocks, preferred or common, shares or interests in options, futures, warrants, limited partnership interest and life insurance"); See, 6 Del. C. § 7303(a)(13)(in defining "securities" the General Assembly refers to security warrants and rights, and specifically exempts insurance policies of the type discussed here).

Third, under the rules of statutory construction, words are construed to include objects similar to those specifically enumerated. Triple C Railcar Service, Inc. v. City of Wilmington, Del. Super., C.A. No. 90C-FE-101, Gebelein, J. (September 17, 1992). The enumerated terms in the financial disclosure definition deal with various types of securities that carry conversion privileges. A securities "warrant" is the right to subscribe to a security and carries conversion rights. Securities Regulation: Cases and Material, (6th ed., 1987). A security "warrant" is not the same as a contract "warrant" which means to engage or promise that a certain fact or state of facts, in relation to the subject-matter is, or shall be, as it is represented to be. Black's, Law Dictionary, p. 1421. Moreover, Delaware security laws specifically provide that "security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period. 6 Del. C. § 7303(a)(13).

Thus, life insurance policies are not warrants under Delaware law and even if they were, they would be contract warrants, not securities warrants. As the definition embraces securities with conversion rights, not contract warrants, life insurance policies would not be reported as a warrant under the financial disclosure statute.

(2) Is a life insurance policy a “right”?

Delaware has recognized ownership rights in life insurance policies and permits transfer of such rights by contract in other situations. *See, e.g., 13 Del. C. § 323 (permits assignment of “ownership rights” of life insurance policies in pre-nuptial agreements).*

However, again, under the rules of statutory construction, words are construed to embrace objects similar in nature to those enumerated by the specific words. *Triple C, supra*. As noted, the enumerated terms in the financial disclosure definition deal with types of securities with conversion privileges, not contracts.

Securities “rights” are direct offerings made to existing shareholders allocated in proportion to the size of existing holdings of the issuer’s securities. Like security warrants, security rights carry conversion privileges. *Securities Regulations, supra at 29 and 396*. Thus, the term embraced by the statute would be a security “right,” not a contract “right.” Therefore, life insurance policies would not be reported as a “right” under the financial disclosure law.

(3) As the statute is not limited to the specific terms, did the General Assembly intend to include insurance policies by the phrase “not limited to”?

Aside from the fact that the terms listed in the definition embrace securities, not contracts, further evidence that the General Assembly did not intend to include insurance policies in the enumerated instruments or by using the phrase “not limited to” is found in the legislative history of the financial disclosure statute. Initially, the proposed legislation required public officials to file a statement of financial interests, and included the requirement to report “the name of each business, insurance policy, or trust in which he or a member of his household has a financial interest....” *H.B. 532, June 27, 1973(emphasis added)*. However, when the General Assembly adopted the legislation, it did not include the requirement to report insurance policies. *S.B. 124 (creating the subchapter on financial disclosure, which became law on*

7/23/74). Thus, the General Assembly specifically considered, but subsequently rejected the requirement to report any type of insurance policy, which would include life insurance policies.

CONCLUSION:

Life insurance policies are not reported as an instrument of ownership because: (1) they are not “warrants” under Delaware life insurance laws; (2) in investment and securities laws, the General Assembly clearly and precisely deals with life insurance policies as they relate to investment and securities instruments and could have done so in the financial disclosure statute; (3) the enumerated words embrace objects related to securities, not contracts; and (4) legislative history shows that the General Assembly specifically considered, but chose to reject, the requirement to disclose insurance policies. (*Commission Op. No. 99-14*).

**What is the “Value” of
Tickets to Grand Gala**

The State Public Integrity Commission received notice that a State officer in the Executive Branch accepted tickets to the Grand Gala and dinner from a private enterprise. In his correspondence, he noted that the “real value” was \$50 with a “face value” of \$450. Also, he received tickets to the Nicholas and Alexandra Exhibit, from Broughton International, which he listed according to “face value” and “real value.”

**(A) “Value” Under the
Financial Disclosure Law**

As a point of clarification, the financial disclosure statute requires public officers to report “any gift with a value in excess of \$250.” 29 *Del. C. § 5813(a)(4)*. The term “value” must be given its plain and ordinary meaning which means “marketable price.” *Commission Op. Nos. 96-07 & 96-33*. Thus, for reporting under the financial disclosure law, the value is what one would have to pay or contribute to participate in that particular event. *Id.*

**(B) “Value”
Under the Executive Orders**

Because he was an officer in the Executive Branch, the Commission also noted that: “value” under Executive Order No. 5 is “the price paid for the gift by the source of the gift.” *Commission Op. No. 96-28 (citing E.O. 5 ¶ 2.)*. However, that the Executive Order has a different definition of “value” to the extent that it provides:

“[t]he price paid for the gift by the

source of the gift. However, with respect to an invitation received to an event held by an organization which qualifies as a charitable organization...the "value" is the portion of the ticket price which is not deductible by the purchaser Furthermore, with respect to an invitation received to an event held by an organization other than a charitable organization ...the "value" shall be that portion of the ticket price which reflects the per person costs to the sponsoring organization to hold the event... ." E.O. No. 5 ¶ 2.

Executive Orders cannot conflict with a statute. *See, Att'y Gen. Op. No. 84-1018*(since Executive Orders do not conflict with constitutional or statutory provisions, they are binding on Executive branch employees); *See also, Annotation: Validity and Construction of Orders and Enactments Requiring Public Officers and Employees, or Candidates for Office to Disclose Financial Condition, Interests, or Relationships*, 22 ALR 4th 237 § 8[b](where Executive Order on Financial Disclosure was contrary to State financial disclosure statute, Court said that in no event could an executive order be contrary to the statute because it was the governor's power to execute law, not create or interpret them.) Thus, to the extent the Executive Order definition creates a conflict with the financial disclosure statute because its definition of "value" could result in less disclosure than the statute requires, to comply with the financial disclosure statute, Executive branch officials should report gifts "valued" at more than \$250, without any exceptions. Thus, the market price "value" would be reported.

**(C) "Value"
for Addendums Required by
Executive Order**

The Executive Orders also require Senior Executive Branch officials to attach an addendum reflecting gifts "valued" at more than \$100. For those gifts, the Executive Order definition of "value" could apply since there is no impact on the financial disclosure statute, which deals only with gifts valued in excess of \$250.

The Executive Orders also mandate that Senior Executive officials report gifts valued at more than \$250 within 30 days of receipt so that the Commission can decide if any ethical issue is raised. *E.O. 19*. To decide if ethical issues are raised, the Commission applies the Code of Conduct provision on accepting gifts. Gifts may be accepted unless acceptance may result in: (1) impaired independence of judgment; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

Are Ethical Issues Raised?

As no details were given concerning any decision making authority the public officer may have over the gift givers; whether he would be in a position to give preferential treatment to them, etc., the Commission notified him that it could not render the decision required by the Executive Order on whether any ethical issues are raised. (*Commission Op. No. 99-09*).

The Grand Gala Revisited

Another public officer notified the Commission, pursuant to Executive Orders No. 5 & 19, of receiving two tickets valued at \$225 each to attend the Grand Gala from a private corporation. As the total value of the two tickets was more than \$250, the source and value would be reported on the financial disclosure report. 29 *Del. C.* § 5813 (a)(4)(e); *See, Commission Op. No. 99-09, supra*.

Is any ethical issue raised?

The Executive Orders require the Commission to decide if any ethical issue is raised by acceptance. *E.O. No. 19*. Based on the following law and facts, we concluded that no ethical issue is raised by acceptance.

In deciding if any ethical issue is raised, the Commission applies the Code provision which restricts State employees and officials from accepting gifts if it may result in: (1) impaired independent judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in its government. 29 *Del. C.* § 5806(b).

The officer indicated that in his official duties, he had no issues or matters with the company, nor did he expect any future matters before him involving the company. As he

would not be making decisions regarding the company, it did not appear that his judgment would be impaired in performing official duties. No facts are given that would indicate that he would show preferential treatment to the company or make official decisions outside official channels on its behalf.

The question of whether acceptance may result in any adverse effect on the public's confidence in the integrity of its government is essentially an "appearance of impropriety" standard. We have noted that when a private source pays the expenses of a public official, it may evoke at least two ethical issues in the minds of the public:

- (1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*.
- (2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from a private source may create at least the appearance that the official is using public office for private gain. *Id.*

Here, the company was a registered lobbying organization. Thus, it has clearly expressed an interest in the decisions to be made on legislative and administrative actions in the State of Delaware. Certainly, some members of the public may view a Senior level official's acceptance of tickets to a rather lavish event from an organization which has expressed interest in legislative or administrative decisions to be made by the State as creating "an appearance of impropriety" because it could be seen as an attempt to curry favor. However, we must base our opinions on a "particular fact situation." 29 *Del. C.* § 5807(c). Moreover, those particular facts must be placed within the framework of the law. First, we note that the General Assembly chose not to place a total ban on gift acceptance; rather, it requires that we evaluate, on a case-by-case basis, the acceptance of gifts. Second, the law requires that the Code be interpreted giving a legal presumption of "honesty and integrity" to State officials. *Beebe Medical Center, Inc. v. Certificate of Need Appeals Board, Del.*

Super., C.A. No. 94A-01-004, J. Terry (June 30, 1995) aff'd, Del. Supr., No. 304 (January 29, 1996).

Thus, while the company has expressed an interest in government decisions, the official presently had no decisions pending regarding the company; nor had he made decisions about it prior to accepting the tickets. Because the company dealt in certain matters where the State had recently been involved in legislation, the Commission asked about the involvement of the official's office on those matters. He explained that persons in his office were involved in the legislation. However, the particular company was not affected by the legislation because it applies only to companies which supplied Delaware customers, and this company did not supply Delaware customers. While the legislation would permit new suppliers to offer such services to Delaware customers, and as a consequence the company could, at some point, decide to enter the market, such activity was purely speculative at this time, and the Commission cannot base decisions on speculative facts. *Commission Op. No. 97-11*. Accordingly, based on the particular facts, it did not appear that the tickets were offered to curry favor in decision making since he had not been and was not presently making decisions regarding the company.

Regarding whether acceptance may create the appearance that he was using public office for private advantage or gain, we have previously noted that when a private source pays for State officials to attend events, the public may suspect that the officials are using their public position for social advantage or private gain. *See, Commission Op. No. 97-33*. We also noted that the differences in appearance of impropriety can vary depending on whether the evening's event consists of a reception of juice and cookies as compared to cocktails, dinner, etc. *Id.* We note that this was an evening of rather lavish entertainment from a lobbying organization to a person who holds a key position in the administration. Even some of the Commission members struggled with this. However, we must place that fact within the total factual circumstances. Here, as noted, the company was not seeking official action by his office; did not do business with or seek to do business with his office; was not regulated by his office; and had no interests pending that may be substantially affected by the

performance or nonperformance of the official's duties. Moreover, by law, he is entitled to the presumption of honesty and integrity. No facts indicate that such presumption was overcome. Accordingly, based on the particular facts, no violation was found. (*Commission Op. No. 99-05*).

Corporate Aircraft Travel

The State Public Integrity Commission received notice that a Public Officer in the Executive Branch was asked to be the guest speaker at the annual meeting of a research and manufacturing association in Florida. He was asked to speak not only because of his State position but because he also chaired a national organization, which dealt with legislative and policy issues of interest to the research/manufacturing group. The private association paid his travel expenses which were estimated at \$2,424.46. The issues raised were whether: (1) his participation constituted "consideration of equal or greater value" such that the payment would not be a "gift" under the financial disclosure law; and (2) acceptance of payment of expenses by the private enterprise raised any ethical issues under the State Code of Conduct. For the following reasons, the Commission concluded that his participation in the meeting constituted sufficient consideration so that the payment would not be a "gift" and that, based on the facts below, acceptance does not raise an ethical issue.

(A) "Consideration of equal or greater value"

Under the financial disclosure statute, "gifts" valued at more than \$250 are to be reported unless there was consideration of equal or greater value given. 29 *Del. C.* §5812(o). Here, the public officer agreed to speak at the association's annual meeting, covering particular legislative and policy issues, not only as they related to Delaware, but also on a national level from his perspective as chair of a national organization. His speech lasted about 45 minutes. He did not attend any meals, golf outings or other such events. Immediately after speaking, he returned to Delaware. Based on these facts, the Commission concluded that there was "consideration of equal or greater value." Therefore, the payment would not be a "gift" under the financial disclosure law.

(B) Are any ethical issues raised by acceptance?

The Code of Conduct restricts acceptance of payment of expenses if it may result in:

- (1) impaired independent judgment in

performing official duties;

(2) preferential treatment to any person;

(3) official decisions outside official channels;

(4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b).

In his State capacity he had no direct or immediate decision-making authority over the private association. No facts were given indicating that in his State capacity he had any significant indirect or anticipated future decision making authority relative to the association. Based on those facts, it did not appear that his judgment would be impaired in performing official duties for the State. The correspondence indicated that he spoke on certain legislative and policy issues, emerging trends in Delaware, and possible changes in federal and State programs. The association is registered as a lobbying organization in Delaware, and therefore would have an interest in Delaware laws and administrative actions in areas which may impact on its membership, but no facts indicated any issues affecting the association were supported by his office, or that the association was seeking to have any legislation or administrative action introduced or drafted by his office. Based on those facts, it did not appear that in his State position he would give the association preferential treatment or would make official decisions outside official channels.

Whether acceptance would have any adverse effect on the public's confidence in the integrity of its government is based on the totality of the circumstances. *Commission Op. Nos. 96-78 and 97-23*. We have noted that courts have held that when a government official accepts travel expenses from a private party it may evoke at least two ethical concerns:

(1) It may appear to the public that the official may be beholden to the private interest and prone to provide decisional "favors" in return. *Commission Op. No. 97-33 (citing Sanjour v. EPA, U.S. Court of Appeals (D.C.) 56 F.3d 85, 94 (1995))*.

(2) Even if there is no reason to suspect the private payor is trying to curry favor with the official whose expenses are paid, the official's acceptance of benefits from

a private source may create at least the appearance that the official is using public office for private gain. *Id.*

Here, the association was registered as a lobbying organization in Delaware. Thus, it clearly has expressed an active interest in Delaware's legislative and administrative actions which could impact on its membership. Thus, the public could view the payment of expenses as an attempt to curry favor with an official who could be in a position to help them on either legislative issues or administrative actions. However, against that concern, we must balance the remaining facts. Specifically, as noted above, based on the facts provided, no legislative or administrative actions were presently pending which diminishes the possibility that his judgment would be impaired; that he would give preferential treatment; or would make official decisions outside official channels. Moreover, the time spent at the conference was basically limited to the time during which he was speaking, leaving little, if any, possibility for the members of the association to "lobby" him on their views. Additionally, he received no personal benefit, such as honoraria, nor did he engage in activities such as golfing, etc. Thus, no facts indicate that he used his public position for private gain. The Commission also noted that the reason for accepting the corporate aircraft was because of a long standing commitment to participate in a program back in Delaware. Because of that commitment, he could only accept the speaking engagement if arrangements could be made for him to return to Delaware in time to meet his prior commitment. Moreover, he was invited not just because of his State position, but also because of the broader perspective he could bring to the proceedings as chair of the national organization. This also aids in diminishing the possibility that he was sought as a speaker just as a means of currying favor with him because of his State position.

CONCLUSION:

Based on the above facts, the Commission found that: (1) consideration of equal or greater value was given and therefore the payment of his expenses by a private enterprise need not be reported as a gift under the financial disclosure law ; and (2) based on the particular facts, no ethical issues are raised by acceptance of the payment of expenses. (*Commission Op. No. 99-17*).

More Travel on Corporate Aircraft - Consistency in Opinions

A Senior Executive Branch official notified the Commission that he accepted travel on a corporate aircraft under circumstances essentially identical to addressed in a 1996 Commission Opinion. *Commission Op. No. 96-26*. The Commission must strive for consistency in its opinions. 29 *Del. C. § 5809(5)*. Accordingly, as there were no distinctive factual differences between the 1996 situation and this situation, the Commission concluded, for the reasons expressed in its earlier opinion that: (1) as the value—\$460—exceeded \$250, it should be disclosed in the official's annual financial disclosure statement; and (2) no ethical issues were raised by acceptance. (*Commission Op. No. 99-39*).

Tickets to an Exhibition

A Division Director accepted two tickets valued at \$200 each from a private enterprise to attend an exhibition. The official could use the second ticket to bring a guest. Aside from viewing the exhibition, presentations were made by public officials, a meal was served, and there was entertainment. The issues were whether: (1) the tickets were to be reported under the financial disclosure statute; and (2) any ethical issue was raised by acceptance.

Financial Disclosure Requirements

**Was There
"Consideration of Equal or
Greater Value"?**

Under the financial disclosure statute the issue is whether to report the ticket value as a "gift" or whether the official's attendance constituted "consideration of equal or greater value," which would remove it from the reporting requirement. 29 *Del. C. § 5813 (a)(4)(e)*.

The Commission is to be consistent in its opinions. 29 *Del. C. § 5809(5)*. We have held that "consideration" generally means that something is given in exchange to the gift giver. *Commission Op. No. 99-26(citing Merriam Webster's Collegiate Dictionary, p. 246 (10th ed. 1994)(consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); and 17A Am. Jur. 2d Contracts §§ 113 and 114.)*

In a prior opinion to this same official, addressing similar circumstances, we held that the value of the ticket for a guest was to be reported. *Commission Op. No. 97-33*. Regarding the official's own ticket, several reasons were given for the offer of the tickets. However, the "motive" behind an offer

and acceptance is distinct and different from "consideration." *See, e.g., Commission Op. Nos. 96-26 & 97-01 (citing 17A Am. Jur. 2d Contracts § 115) (where sponsor gave tickets to an official to attend because of his status as a public official, consideration was not of equal or greater value).* While public officials spoke at the event, it was not suggested that this particular official gave a presentation. As "consideration" means that "something is given in exchange," *Commission Op. No. 97-01*, and the facts did not indicate an exchange between the official and the private company for a presentation, there was no "consideration" on that basis.

In later correspondence, the official said a Senior Level Executive Branch official, who was involved in matters related to decisions concerning State funds for the organization, specifically asked her to observe and assist the company to insure the success of its projects as the State had invested substantially. Where the benefit accrues to the public officer personally and to some extent to the State, with the gift giver receiving little or no benefit, then the consideration is not "equal to or greater than" as required by the statute. *Commission Op. No. 97-01.*

Here, the benefit passed personally to the official and the guest, who attended an evening's entertainment. The benefit obtained by the State was that it might gain some insight as to the success of the program. As the State may have benefitted from the official's attendance, any "consideration" was to the State, not to the gift giver. Therefore, the ticket value would be reported under the Financial Disclosure Statute.

**Were any Ethical Issues
Raised?**

As the official was in the Executive Branch, the Commission reviewed the facts to decide if any ethical issue was raised under the Code of Conduct, as required by Executive Orders 5 and 19.

Again, we must be consistent in our opinions. In prior opinions, we said that when private sources confer benefits on public employees to perform agency related functions, it may raise, at least, an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), F.3d 85, 94*

(1995)(interpreting federal ethics restrictions on accepting payment from private sources for performing official duties). Two ethical concerns noted in *Sanjour* are:

(1) when a public employee accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “favors” in return. *Id.*

(2) even if there is no reason to suspect that the private party is trying to curry favor with the employee, the acceptance of benefits from a private source may raise the appearance that government employees are using public office for private gain. *Id.*

In that prior opinion, we noted that by statute, officials from this particular office were entitled to reimbursement for expenses incident to official duties. *Id.* Thus, to the extent Senior level Executive Branch official asked her to attend, attendance may have been incident to official duties for which the State could have paid the official’s expenses (but not necessarily those of her guest). *Id.* When the State pays, the ethical concerns raised when payments are made by private enterprises do not arise because it is presumed that: (1) such payments are in the legitimate conduct of State business and (2) the employees are then under the “watchful eye” of the agency. *Commission Ltr to Public Officers, January 21, 1997.* At least one Commissioner believed that payment might have been obtained from the State in this situation.

We have urged officials to “exercise great caution” if tickets are accepted from a private enterprise if the official makes decisions about the private enterprise, because it could appear that the offer is to curry favor or influence decisions. *Commission Op. No. 97-33.* We noted that offering additional tickets may also raise the appearance that the offer was to curry favor or influence the decision maker. *Id.* Moreover, accepting the additional tickets may raise suspicion that the official is using public office to obtain “private perks.” *Id.* We noted that the concerns increase if the event is rather lavish. *Id.*

Here, the official attended because she was asked to observe and assist the company to insure the success of its projects.

Logically, if asked to "observe and assist the company," it should be anticipated that the official would develop and express an opinion on the success of the project. As the State "has invested substantially in this project," the official's opinion could impact on future decisions regarding State funding to the company. Thus, it could appear that the offer was to "curry favor" because of the official's significant, indirect decision making authority. We also note that the tickets to this event were \$200 each, while the tickets made available to the general public are \$13. This indicates that the event the official attended was likely more lavish than what the public receives.

However, to decide if acceptance may have an adverse effect on the public's confidence in its government, we first note that there is a legal presumption of honesty and integrity in the conduct of government officials. Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff'd*, Del. Supr., No. 304, Veasey, J. (January 29, 1996). We also must place the concerns about currying favor in decision making and using public office to obtain unwarranted privileges, private advancement or gain within the totality of the circumstances. *Commission Op. No. 96-78*. While the event apparently was more lavish than what is available to the general public and while she had significant, indirect decision making authority which could affect the company's State funding, the official said that the Governor asked her to participate; and the evening was not solely directed at entertaining as official presentations were made. Thus, we distinguish this situation from one where we found it improper for a government official to accept tickets to a musical concert where there were no official activities, and he had decision making authority over the gift giver. *Commission Op. No. 98-35*. Moreover, the nature of this particular official's position was that the matters over which she had decision making authority were ones connected to the particular type of exhibition. Additionally, no facts indicated that any matter concerning the company's funding was under review when she attended, as it was in No. 98-35. Compare also, *Commission Op. No. 97-11* (members of a State agency which routinely made decisions regarding private company should not attend company's "gala" when the sponsor had matters pending

before the Commission).

Accordingly, while we still encourage “great caution” in accepting payment of expenses from an organization over which an official has even an indirect, but significant, decision making authority, we find no violation in this particular instance. (*Commission Op. No. 99-20*).

Panelist at a Conference

A Senior Executive Branch Official attended an out of state conference for government officials and business organizations. He was selected as a panelist for an evening business session and also participated in a morning business

session to present the Executive Branch’s perspective as part of the discussions. After the morning business session, he participated in a round of golf and then returned to Delaware. A private enterprise, which was registered as a lobbying organization, paid the expenses for his overnight lodging, meals and round of golf. Although the conference lasted for 3 days, he went late on Friday and returned on Saturday. Payment of his expenses for one night’s lodging, one dinner, one lunch, one breakfast, and a round of golf were valued at approximately \$530.

His dealings with the private enterprise in his official capacity, consisted of: regularly participating in meetings and forums sponsored the private enterprise to discuss public policy issues; working with the private organization on a study on public policies; and meeting with this private enterprise, and other businesses and civic groups to present information on certain policy issues.

Two issues were raised: (1) whether payment of his expenses should be reported under the financial disclosure law; and (2) whether accepting the payment raised any ethical issue under the State Code of Conduct.

**Financial disclosure law:
“Consideration of Equal or
Greater Value”?**

State officers must report gifts of more than \$250. 29 Del. C. § 5813(a)(4)(e). “Gift” includes payment or anything of value unless “consideration of equal or greater value” is given in return. 29 Del. C. § 5812(o). If it is a “gift” then it is to be reported; if sufficient consideration is given, it is not a “gift” and need not be reported.

Based on the particular facts, there was “consideration of equal or greater value” given where in return for payment of his expenses, he participated in both an evening and morning business session, and although he received the additional benefit of participating in a round of golf, this activity was not the primary focus of the time you spent at the retreat. As there was consideration of equal or greater value, he was not required to report the payment as a “gift” under the financial disclosure statute. *Compare, Commission Op. No. 96-07 & 96-37 (No consideration of equal or greater value where business meetings were incidental as compared to the majority of the conference time which was not directed at business).*

**Were any Ethical Issues
Raised?**

The Code restricts acceptance of payment of expenses if it may result in: (1) impaired independence of judgment in performing official duties; or (2) official decisions outside official channels; or (3) preferential treatment to any person; or (4) have any adverse effect on the public’s confidence in the integrity of its government. 29 *Del. C. § 5806(b)*. The concerns addressed by the Code of Conduct restrictions are that when private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d. 85, 94 (1995).* Two ethical issues noted by the *Sanjour* court were:

(1) when a public official accepts benefits from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide “favors” in return. *Id.*

(2) even if there is no reason to suspect that the private party is trying to curry favor with the official, the official’s acceptance of benefits from a private source may raise the appearance that government employees are using public office for private gain. *Id.*

In prior opinions, we noted that lobbying organizations, through their registration, have indicated a clearly expressed interest in the State’s legislative and administrative activities.

Commission Op. Nos. 99-05 & 99-17. Accordingly, we urged that caution be used in accepting benefits from such entities. *Id.* However, the question is whether that clear interest in State decisions, based on the particular facts, may raise the appearance that the recipient is beholden to or prone to provide favors to the private enterprise. Here, it did not appear that the official had any decision making authority over the private enterprise. It had no contracts with his agency, and he advised this entity and other private enterprises of various State fiscal issues, it did not appear that the interactions he described could result in any official decisions about the private enterprise in which his judgment would be impaired or that he was in a position to give it preferential treatment or make official decisions outside official channels.

The question of whether an official's acceptance of benefits from a private source may raise the appearance that such officials are using public office for private gain, also must be considered based on the particular facts. While an overnight trip out of State and the accouterments (lodging, golf, and meals) valued at \$530 might be considered fairly lavish by some, the Commission also notes that he left Delaware late on Friday to participate as a panelist that evening. He did not seek the benefit of staying all three days; or the benefit of payment of expenses for his spouse although apparently the private enterprise apparently would have paid those costs. On Saturday morning, he also participated in official meetings. At the conclusion of those meetings, he played a round of golf before returning to Delaware that same day. Based on the particular facts, we find no violation of 29 *Del. C.* § 5806(b). (*Commission Op. No. 99-38*).

Referral of Suspected Violations

Failure to Notarize

The financial disclosure statute requires that reports be notarized. 29 *Del. C.* § 5813(a). It also provides if a public officer willfully fails to file a report in violation of Section 5813 of the statute, it is a class B misdemeanor. 29 *Del. C.* § 5815(a).

A candidate for State office did not have his report notarized. He was sent notice of the requirement by the Commission, but

stated that he would not have it notarized. The matter was referred to the Attorney General's office pursuant to 29 Del. C. § 5815(c), which provides that the Commission may refer suspected violations to the Attorney General. The Attorney General's office concluded that there was substantial compliance in filing the report. (*Commission Op. No. 99-08*).

Failure to File

A Public Officer failed to file an annual financial disclosure report by the statutory date of mid-February. After the due date passed, notice that the report was not received was sent to the officer. After no response, a second notice was sent by certified mail. It was returned as "refused." Subsequent efforts were made to contact the public officer by leaving phone messages, sending e-mails, and writing additional letters. After repeated attempts resulted in no response, the Commission referred the matter to the Attorney General pursuant to 29 Del. C. § 5815(c), which provides that suspected violations may be referred to the Attorney General. One violation of the statute is for the public officer to willfully fail to file a report. 29 Del. C. § 5815(a). The officer responded after notice from the Attorney General's office. (*Commission Op. No. 99-23*).

STATE PUBLIC INTEGRITY COMMISSION

Financial Disclosure Opinion Synopses - 2000

Who Must Report?

Must “Masters” File Financial Disclosure Reports?

The Commission was asked if Masters in Superior Court were required to file a financial disclosure report. It concluded that the statute does not include such positions. That decision is consistent with a prior opinion, holding that as a general rule of law, where a statute lists the persons to whom the law applies, there is an inference that the legislature intended all omissions. *Financial Disclosure Op. No. 95-001*.

We have made only one exception to that general rule, holding that although Court Commissioners were not listed in the statute, they are required to file. *Commission Op. No. 96-03*. We based that ruling on the fact that Court Commissioner positions did not exist when the statute was passed. Therefore, the General Assembly, in creating the legislation, could not have contemplated or had any intent in mind on whether those persons must file. *Commission Op. No. 96-03*. Because of the similarity between Court Commissioners and Judges, persons holding those positions would be required to file. *Id.*

However, the Master’s position is not the same as a Court Commissioner’s position (e.g., Master is not nominated by the Governor and approved by the Senate, etc..) Also, while Court Commissioner positions did not exist when the legislation was passed, Master’s position did exist in several courts. Therefore, by law, it is presumed that the omission of the Master’s position was intended, especially as the General Assembly specifically listed not only Judges positions but also positions such as Court Administrators, as persons who are required to file. Accordingly, as the position is not listed in the statute, but did exist when the legislation was passed, such persons need not file a financial disclosure report. (*Commission Op. No. 00-16*).

What Must be Reported?

Recognition as an Alumnus

A private foundation paid the expenses for a Public Officer to return to his alma mater as a special guest speaker when he was honored as an alumnus. Based on the following facts and law, the value need not

be reported as a "gift" under the financial disclosure law and acceptance did not raise any ethical issue under the Code of Conduct.

**"Gift" includes
"Payment" and
"Anything of Value"**

The Foundation paid the public officer's expenses for travel, lodging, parking and dinner when he was honored as an alumnus and was the event's special guest speaker. The total value was \$866.69. Under the financial disclosure law "gift" includes "payment" or "anything of value." 29 *Del. C.* § 5812(o). However, an item is not a "gift" if consideration of equal or greater value is given. 29 *Del. C.* § 5812(o). "Consideration" generally means that something is given in exchange. *See, Merriam Webster's Collegiate Dictionary*, p. 246 (10th ed. 1994)(consideration is a recompense; payment; an act, forbearance or promise given by one party in return for an act or promise of another); *See also*, 17A *Am. Jur. 2d Contracts* §§ 113 and 114.

**But: "Consideration"
can mean no "Gift"**

In return for the Foundation paying his expenses, he attended the function and was a speaker. Where individuals serve as speakers such activity constitutes "some consideration." *See, e.g. Commission Op. No. 99-17*. Whether it is consideration of "equal or greater value" depends on the particular facts, e.g., length of the event, portion of event spent engaging in official activities versus portion of event not engaged in official activities. *Id.* Here, he left for the out-of-state event late in the afternoon, for an early evening reception. The ceremony at which he was introduced and spoke started an hour later. He stayed overnight and caught a 7:30 a.m. flight. Based on these facts, there was consideration of equal or greater value. Thus, the payment need not be reported as a "gift" on his financial disclosure report.

**Is any Ethical Issue
Raised?**

When a Senior Level Executive Branch officer accepts a payment of more than \$250, the Commission must decide if any ethical issue is raised by acceptance. *E.O. 19* ¶ 5. State officials may not accept gifts, payments of expenses, or anything of monetary value, if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

In his official capacity, he had no decision making authority over the Foundation and no dealings with it other than using the opportunity as its guest speaker. Where a government official has no decision making authority over an organization which gives them something of value, it is unlikely that their independent judgment will be

impaired or that the person will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. Thus, the remaining issue is if acceptance creates any appearance of

impropriety. To decide if acceptance raises an appearance of impropriety, we look at the totality of the circumstances. *Commission Op. No. 97-23*. Here, based on the reason for attending, the limited time spent as the organization's guest, the activities engaged in, the fact that he had no decision making authority over the organization, etc., acceptance did not raise any appearance of impropriety. (*Commission Op. No. 99-46*).

Briefcase and Painting

A State officer accepted two gifts valued at more than \$250 each: (1) a painting by a local artist; and (2) a briefcase from a national association. Based on the following law and facts, we find: (a) the source and value of the painting should be reported as a gift on his annual financial disclosure report; (b) the source and value of the briefcase need not be reported as a gift on that report; and (c) no ethical issues are raised by the acceptance of either item.

Report "Anything of Value" Greater than \$250 Under the financial disclosure law, the source and value of "gifts" valued at more than \$250 must be reported. 29 *Del. C. § 5813(a)(4)(e)*. "Gift" includes "anything of value." 29 *Del. C. § 5812(o)*. Here, the estimated values are: \$700 for the painting; and \$310 for the briefcase. However, an item is not a "gift" if consideration of equal or greater value is given. 29 *Del. C. § 5812(o)*.

(A) The Painting

Traditionally, the local artist gives certain Senior Level officials an original painting before they leave office. The State officer planned to take the painting and other personal belongings when his term ended. No facts suggested that he gave anything in return for the painting. As he gave no consideration, the item, its source, and its value should be reported.

(B) The Briefcase

The national association gave the briefcase to him as a token of its appreciation for his work as its Chair. As Chair, he managed the organization's activities, such as forums on education reform, tobacco litigation settlement, served as host when the organization met in Delaware, led its efforts to inform Congress on certain issues, etc. Many hours were spent on these functions. This Commission has held that where a State official was an officer of a national organization and was expected to participate in planning organizational activities, preside over meetings, attend and participate

in the organization's activities, etc., that the actual performance of those duties was "consideration of equal or greater value" where the "thing of value" received was the costs of his travel, hotel, etc. *Commission Op. No. 96-40*.

Here, the "thing of value" is a briefcase, but the exchange—performing the required organizational functions in return for something of value—is the same. To be consistent with our prior ruling, we find that his participation is equal to or greater than the value of the briefcase.

Is an Ethical Issue Raised? When Senior Level Executive Branch officials receive gifts valued at more than \$250, in addition to complying with the financial disclosure law, they must obtain a ruling on whether acceptance raises any ethical issues under the Code of Conduct. *E.O. 19* ¶ 5. State officials are restricted from accepting "gifts" or "any other thing of monetary value" if it may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. *29 Del. C. § 5806(b)*. As both items are "things of monetary value," the statutory provisions are applied as follows.

(A) The Painting

In his official capacity, he had no direct or immediate decision making authority over the artist. Where a State official has no decision making authority over the entity which gives them a thing of value, it is unlikely their independent judgment will be impaired or that the entity will receive preferential treatment in the official's decisions. *Commission Op. No. 97-43*. The remaining issue is if acceptance may create an appearance of impropriety, e.g., would it appear that he was using public office for unwarranted privileges or private gain, which *29 Del. C. § 5806(e)* prohibits. Obviously, the painting was given because of the public office he held. By accepting, he privately gained the painting and its value. However, this is a gift traditionally given to the occupant of this Senior Level position before the official leaves office, diminishing any perception that he used public office for unwarranted privileges or private gain.

(B) The Briefcase

Again, in his official capacity, he had no direct or immediate decision making authority over the association. Thus, it was unlikely his judgment would be impaired or that the association will receive preferential treatment in his official decisions. *See, Commission Op. No. 97-43*. Again, the issue is whether acceptance may result in any

appearance of impropriety. Based on the particular circumstances under which the “thing of value” was given--in return for performing duties as Chair of the association; and the fact that he had no decision making authority over the association--it does not appear that the item was given or accepted as a result of any special or unwarranted privileges or personal gain. (*Commission Op. No. 99-50*).

Point-to-Point Tickets

A company gave two tickets to Point-to-Point at Winterthur to a State officer who was involved in regulating the industry of which the company was a part. The Commission concluded that the tickets should be reported under the financial disclosure reporting law, and that acceptance raises ethical issues for the reasons detailed below.

**“Motive” is not
“Consideration”**

Under the financial disclosure law, gifts valued at more than \$250 are to be reported unless consideration of equal or greater value is given. 29 *Del. C. §§ 5812(o) & 5813(a)(4)(e)*. The two tickets were valued at \$681.50. He attended the event because he was encouraged to develop good relations with the regulated industry, due to its importance to the State’s economy and such events were attended by persons who previously held his position. The motive prompting one to enter an agreement is distinct and different from “consideration.” *Commission Op. No. 96-26 (citing 17A Am. Jur. 2d Contracts § 115)*.

As “motive” is not “consideration,” and no facts indicate that anything was given in return, then the item is a “gift” and reportable under the financial disclosure statute and the Executive Orders. *Id.* Here, no facts indicated that he gave anything in return. Accordingly, the source and value would be reported as a gift in his annual financial disclosure report.

Is an Ethical Issue Raised? When gifts are reported pursuant to Executive Orders 5 & 19, we decide if any ethical issues are raised by acceptance. *E.O. No. 19 ¶ 2*. To decide if accepting a gift raises ethical issues, we apply the Code of Conduct. State officers may not accept any compensation, gift, payment of expenses or any other thing of monetary value under circumstances where acceptance may result in:

- (1) Impaired independence of judgment in exercising of official duties;
- (2) An undertaking to give preferential treatment to any person;
- (3) The making of a governmental decision outside official channels; or
- (4) Any adverse impact on the confidence of the public in

the integrity of the government of the State. 29 Del. C. § 5806(b).

The Code also prohibits State officers from using public office to secure unwarranted privileges, private advantage or gain. 29 Del. C. § 5806(e).

By law, his official duties included responsibility for regulating the industry of this company. (*Citation omitted*). The statute also gave him authority to visit and examine each of the industry's institutions

as frequently as deemed necessary or expedient. (*Citation omitted*). Thus, normally his official duties entail exercising judgment on such matters as examinations over those institutions. However, the particular company was based out-of-state and its own State was its primary state regulator. While his office would normally have concurrent jurisdiction, it entered an agreement with other State regulators in this industry if they had branches in more than one state. Basically, the agreement is that the "home State" will be the primary regulator. Thus, his office did not examine the company. However, despite the agreement, the Commission noted that: it was a highly regulated industry; his authority as a Senior Level Executive Branch official could have a significant impact on how, and by whom, such companies will be regulated; and the company had identified its interest in Delaware's legislative and administrative actions by registering as a lobbying organization. Clearly, it, like other institutions in the industry, would be interested in administrative actions taken by his office.

For example, his office regulated another company in Delaware, which was a small affiliate of the company giving the tickets. Also, by law, he collected certain fees from the company giving the tickets and its small affiliate in Delaware. (*Citation omitted*). The rate is set by State statute, and based on a percentage of the company's net income. (*Citation omitted*). In reviewing the payments, he had some latitude in deciding if the entity had submitted the proper amount. Specifically, by law, the assessment was to be reviewed and corrected by him upon application by any party involved. (*Citation omitted*). Thus, he reviewed the entity's statements and determined if the report complied with the statute. If a regulated entity challenged its assessment, by statute, he was charged with deciding if the assessment would be corrected. He had no recollection of the company or its Delaware affiliate submitting any application for an assessment correction.

The assessments are reviewed at least on a quarterly basis. (*Citation omitted*). The Point-to-Point was on May 2, 1999. It is not clear if any quarterly assessments by the company or its Delaware affiliate were pending review when the tickets were offered. Obviously, the timing of the gift can impact on deciding if independent judgment would be impaired. However, even without that information, the Code restricts acceptance if it may result in any adverse effect on the public's confidence in the integrity of its government. We have held that this is basically an appearance of impropriety test. *Commission Op. No. 96-78*.

In interpreting federal regulations similar to Delaware's Code of Conduct, which address private parties paying for activities of government employees, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns about appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favors" in return. *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995)*.
2. Even if there is no reason to suspect the private payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the specter that the employee is using public office for private gain. *Id.*

He agreed that attending an event hosted by an entity over which he had decision making authority creates a different appearance than if he attended an event hosted by an entity over which he had no decision making authority. That difference is indicated by the terms which require that we look at "whether acceptance would result in impaired independent judgment in performing official duties." We have held that where there is no official duty to make a decision over the gift giver, then judgment cannot be impaired. *See, e.g., Commission Op. No. 97-43*. However, while the question of whether his judgment would be impaired can be easily resolved when no judgments are to be made, the statute is not limited to just that criteria. For example, whether acceptance may have an adverse

effect on the public's confidence in the integrity of its government is basically an appearance of impropriety test and is decided based on the "totality of the circumstances." *Commission Op. No. 96-78*.

Appearance of Impropriety Here, the gift was given by an entity regulated by him. Moreover, the assessment decision alone is an on-going issue before him. Beyond that, when the gift is to a rather lavish event, it also raises the concern in the mind of the public that the official may be using public office to obtain unwarranted privileges, private advancement or gain. *See, Sanjour at 95-96 (noting the difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area).* This event was rather lavish with food, drinks, etc., set up in a special tent for the company to entertain its invited guests. These were not tickets available to the general public. Thus, it could appear that the gift giver was trying to curry favor, or that the public officer was receiving a "private perk" from a company with substantial interests in decisions made by him. Based on the facts, we conclude that acceptance was improper because it raises an appearance of impropriety.

Improper acceptance can result in administrative penalties; however, he was not required to repay the company because he was not aware of the value of the tickets when he accepted them; officials who previously held his position attended such events which affected his decision to accept the tickets; he was encouraged by higher level officials to develop good relations with the industry because of its importance to Delaware's economy; and upon learning of the value of the tickets and reviewing our opinions which raised some concerns in his mind, he immediately came to the Commission for a ruling.

A Word of Caution

We caution that: (1) as the financial disclosure law provides that public officer's may rely on the gift givers' value, 29 Del. C. § 5813(a)(4)(e), they should always be alert to ascertaining the value when offered anything of monetary value; (2) participation in events by officials who previously held the same job does not negate the fact that the Code of Conduct places the responsibility on each individual State employee or officer to comply with the law; and (3) while he may have been encouraged by superiors to develop good relations with the industry, when an entity that is regulated by his office pays for him to socialize with its officials and representatives at a rather lavish event, that is apparently by invitation only, it can take on appearances beyond developing good relations for the reasons stated herein. The fact that a superior does not detect a

conflict, does not excuse a violation of the Code. See, Refine Construction Company, Inc. v. United States, U.S. Cl. Ct. 12 Cl. Ct. 56, 62 (1987)(interpreting federal restriction prohibiting conduct having "any adverse effect on the public's confidence in its government," Court noted that it had repeatedly held that a government employee cannot claim exemption from a conflict of interest simply because his superiors did not discern the conflict. (Commission Op. No. 99-52).

Trip to a Foreign Country A public officer's expenses for a trip overseas were paid by an Institute. The Institute, in cooperation with the Council of State Governments

Eastern Regional Conference (CSG-ERC) put the seminar together for government officials from a number of States. The State of Delaware is a dues paying member of CSG-ERC, which is a multi-state organization that assists states with multi-state and regional solutions on legislative, economic, and other matters. As part of CSG's activities, it puts together international programs which consist of seminars, technical assistance programs and citizens' exchanges. The international programs are coordinated through the standing international committee, which supports the expanding role of states in international trade, economic development and other global activities.

The schedule reflected that most of the officer's time during the days and some evenings entailed participating in various events, e.g., briefings, tours of various locations, home hospitality with foreign counterparts, etc. There was some free time, but much of it was in the early evening before other scheduled events, such as when the officer had free time from 5 p.m. to 7 p.m., followed by a scheduled dinner and discussion for the participants and the foreign hosts, starting at 7 p.m.; and, again on another day when the officer had free time from 5 p.m. to 8 p.m., followed by a scheduled dinner meeting with senior officials from the foreign country at 8 p.m. In addition to the official schedule, the officer was asked by another Delaware official to add a specific activity, if time permitted, such as visiting a hospital in the foreign country. The officer was able to add that to the schedule.

**Was There
"Consideration?"**

The financial disclosure statute defines "gift" to include "payment," and requires that "gifts" valued at more than \$250 be reported unless there is consideration of equal or greater value. 29 *Del. C. § 5812(o) and § 5813(a)(4)(e)*. Items are not a "gift," and therefore not

reported, if there is “consideration” of equal value given to the gift giver. 29 Del. C. § 5812(o). Thus, the financial disclosure issue is whether the official’s participation constituted “consideration” to the Institute which paid for the travel.

The Commission must be consistent in its opinions. 29 Del. C. § 5809(5). In a prior opinion, where a private enterprise paid for a State official to visit a foreign country so that she could learn about international aspects of such matters as manufacturing, etc., the Commission held that any benefit received passed to the official or the State, not to the private enterprise. Accordingly, it held that there was not consideration of equal or greater value as the official did not have to give anything to the gift giver in return. *Commission Op. No. 97-01*.

Here, it also appears that the trip provided the officer with an international understanding of international trade, economic development, etc., which was the purpose of the trip. No facts indicated that the Institute received any benefit or return because of the officer’s attendance. Accordingly, payment of expenses would be reported in the officer’s annual financial disclosure statement.

Were any Ethical Issues Raised?

Executive Order 19 requires that we decide if any ethical issues are raised by acceptance of things of value valued at more than \$250 by a Senior Level Executive Officer. *E.O. 19* ¶ 2. The standard applied is whether acceptance may result in: (1) impaired independence of judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. § 5806(b).

No facts indicated that the officer had any decision making authority over the Institute or could give it preferential treatment or make official decisions outside official channels. Thus, the question is whether acceptance may result in any adverse effect on the public’s confidence in the integrity of its government. 29 Del. C. § 5806(b)(4). This is basically a question of whether there is an appearance of impropriety. *Commission Op. No. 97-42*.

Delaware courts have held that the test for an appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the official’s ability to carry

out official duties with integrity, impartiality and competence is impaired. *In re Williams*, Del. Supr., 701 A.2d 825 (1997). While *Williams* interpreted the Code of Judicial Conduct, such interpretations may be used as guidance in interpreting the State Code of Conduct because the subject (ethics) and the standard (appearance of an ethics violation) apply to public officers in both instances. *See, Commission Op. No. 95-5 (citing Sutherland Stat. Constr. § 45-15, Vol. 2A (5th ed. 1992)(decisions on statutory construction have relevance if both statutes are such closely related subjects that consideration of one naturally brings to mind the other).*

In deciding the appearance of impropriety issue, the Commission looks at the totality of the circumstances, such as the reason for attending, the activities engaged in while attending, etc. *See, e.g., Commission Op. No. 97-23 and 97-42.* Because the officer had no decision making authority over the Institute; the purpose of the trip was educational in nature which served to benefit, not the gift giver, but the State; and the agenda reflects a trip primarily focused on official activities, with little free time, we concluded that no ethical issue was raised by acceptance. (*Commission Op. No. 00-03*).

Gift to Stay at Hotel

The Commission reviewed a notification from a Senior Level Executive Branch official of a gift certificate for services at a hotel. The certificate showed that it was from the hotel's staff, but the officer indicated that the manager gave it to him as a holiday gift. The manager served on an Advisory Board, which worked with this public officer's office on certain matters. The public officer was the head of the agency, and had concerns about the possible appearance of impropriety that acceptance may raise, and wanted a ruling from the Commission to clarify the issue. If acceptance appeared improper, the public officer intended to return the certificate. Based on the following law and facts, the Commission concluded that acceptance may, at a minimum, raise an appearance of impropriety.

"Gift" Rejected; Disclosure Not Required

Under the financial disclosure law, gifts exceeding \$250 are to be reported unless there is consideration of equal or greater value. 29 Del. C. § 5812(o). As no facts suggested that the public officer gave anything in return for the gift certificate, it normally would be reported, and the public officer had done so on his annual financial disclosure report. However, because acceptance would be improper, and therefore he was advised to return it to the gift giver, he was authorized to amend his financial disclosure report.

What were the Ethical Problems?

State officers may not accept gifts if acceptance may result in: (1) impaired judgment in performing official duties; (2) official decisions outside official channels; (3) preferential treatment to any person; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 Del. C. § 5806(b). The Code also prohibits State officers from using public office to obtain unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).

As the head of the agency, his statutory duties included responsibility for, among other things, certain matters that had a significant impact on the hotel. (*Citation Omitted*). Also, by statute, appointees to the Advisory Board to which the manager was appointed, serve in an advisory capacity to this Director and their responsibility is to "consider matters relating to..." the responsibilities of the Director. (*Citation Omitted*). The hotel had a vested interest in those matters. Also, the agency puts together seminars and uses hotel facilities for those seminars. While the decision of what hotel may be used for a seminar is made by one of his staffers, the hotel also could have an interest in being selected by his office as the site for such seminars. We have noted that when private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995).
2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. Id.

Here, the hotel has an interest in insuring that its interests are advanced. In fact, the officer noted that this hotel was a "significant player." Because of his statutory duties, his decisions could directly impact on the interests of the hotel. Since the hotel's manager was on the advisory board, it may appear to the public that the hotel wanted to curry favor in decisions to be made by him. Also, as his office selects hotels as the location for some of its seminars, other hotels or the public may believe that his acceptance of the more than \$250 gift

certificate from the hotel is an endorsement of that hotel, or they may believe it would receive preferential treatment in decisions by him and his staff.

Even if the hotel were not trying to curry favor with him, we have noted that the more lavish the gift, the more it may raise the appearance that State employees are using public office for unwarranted privileges, private advancement or gain. Here, he was offered the opportunity for services at what may be considered one of the best hotels not only in Delaware, but in the region.

When we consider whether the facts may result in any adverse effect on the public's confidence in the integrity of its government, we consider the totality of the circumstances. *Commission Op. No. 96-78*. We also must keep in mind that the Code does not require an actual violation, only that the conduct "may raise suspicion" that the public trust is being violated or "may result in" impaired judgment, preferential treatment, etc. Thus, even where the gift giver has no intent of currying favor, we must balance that fact against the other facts, which are that his position gives him the authority to make decisions that could significantly impact on the hotel's concerns. Thus, acceptance "may raise suspicion" that: his judgment could be impaired; he could give preferential treatment; or make official decisions outside official channels which could benefit the hotel. Moreover, because of the nature of the gift, it may raise suspicion that he is using public office for unwarranted privileges, private advantage or gain. Accordingly, because acceptance may raise such suspicions, we concluded he should return the gift certificate. (*Commission Op. No. 00-07*).

**Reporting Payment of
Family's Expenses**

An Executive Branch public officer notified the Commission of the payment of expenses by a private enterprise for him to attend and speak at its annual meeting. Based on the following law and facts, we concluded that: (1) the value of the payment for lodging for his family should be reported as a "gift;" and (2) accepting the payment does not raise an ethical issue under the Code of Conduct.

**No Consideration
for Expenses of
Family Members**

Public Officers must report gifts valued at more than \$250 under the financial disclosure law, and Executive Branch Officers must also report gifts of more than \$100 from a single source. 29 *Del. C.* § 5813(a)(4)(e) and *E. O. No. 5* ¶ 1. "Gift" includes payment or anything of monetary value, unless consideration of equal or greater value was given. 29 *Del. C.* § 5812(o) and *E. O. No. 5* ¶ 3.

The public officer agreed to speak at the annual meeting to emphasize to the industry the attributes of doing business in Delaware. He also brought his family. He paid for all meals and expenses of the trip, except for two nights lodging, which was paid for by the private organization and valued at \$897.92. It was assumed that the cost of lodging would have been less if he alone had attended.

Based on our prior rulings, his agreement to attend and speak in return for payment of his own expenses constitutes "consideration," which we find to be equal to or greater than the value paid for his trip. *Commission Op. No. 99-17*. However, when a private source pays for an official to attend events to perform official duties, if the private source also pays for a spouse or friend who is not performing an official function, then the value of that part of the payment is a "gift." *Commission Op. No. 97-33*. Thus, under 29 *Del. C.* §5813(a)(4)(e), the value of lodging for his family members would be reported in Section 3(E) of the financial disclosure report if it exceeds \$250; and, under *E.O. No. 5*, reported in an addendum if it exceeds \$100.

His request cited a prior opinion where payment of his air travel of \$2,424.46 in return for speaking at a meeting was found to be adequate consideration, and therefore not treated as a gift. The Commission must base its opinions on the particular facts of each case. 29 *Del. C.* § 5807(c). Thus, it is not enough to compare other trips based solely on the dollar amount, because the issue of "consideration" is whether something of adequate value is given in return under the specific circumstances of each matter. In the prior opinion and this opinion, we concluded that he gave consideration for his expenses. The difference here is the payment of expenses for his family, not for him, for which we found no consideration.

**Were any Ethical
Issues Raised?**

Senior Level Executive Branch officials must also obtain a ruling on whether any ethical issue is raised if they accept a gift valued at more than \$250. *E. O. No. 19* ¶ 5. The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in:

- (1) impaired independence of judgment in performing official duties;
- (2) preferential treatment of any persons;
- (3) official decisions outside official channels; or
- (4) any adverse effect in the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b).

The correspondence indicated that he had no direct or immediate decision making authority over the private organization and no facts were given to indicate the possibility of preferential treatment or official decisions outside official channels. Thus, the issue is whether acceptance may result in any adverse effect in the public's confidence in the integrity of its government. To decide if acceptance adversely effects the public's confidence in the integrity of the government, we look at the totality of the circumstances. *Commission Op. No. 96-78*. This is, in essence, an appearance of impropriety test. *Commission Op. No. 91-12*. In several past opinions, we noted that when private parties pay the expenses or give gifts to public officials, it can evoke at least two ethical concerns regarding appearances:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide "favors" in return. *Sanjour v. Environmental Protection Agency, U.S. Ct. of Appeals (D.C.) 56 F.3d 85, 94 (1995)*.
2. Even if there is no reason to suspect the private payor is trying to curry favor, the employee's acceptance of benefits from a private source may raise the specter that he is using public office for unwarranted privileges, private advancement or gain. *Id.*

In this instance, any appearance of impropriety is negated by the following facts: he had no direct or immediate decision making authority over the private organization; it does not appear that the private organization was attempting to curry favor with him as he had no decision making authority over it; he paid for all expenses associated with his family's trip except for lodging; while the conference ran from June 3 to June 6, he and his family were only there on June 5 and 6; part of that time he was fulfilling his speaking agreement; no facts indicate that the two days were spent in purely social activities provided by the private organization; and he will be reporting the value of his family's lodging. Placing those facts within the total circumstances, we find no appearance of impropriety. (*Commission Op. No. 00-13*).

**CDs and
Organizational
Membership**

Based on the following law and facts, the Commission held that public officers do not have to disclose on their financial disclosure report Certificates of Deposit (CDs), or memberships in

organizations where there is no financial interest.

(A) Certificates of Deposit

The financial disclosure law does not specifically mention if CDs are to be reported. Thus, the issue is whether CDs are encompassed by: (1) "Instruments of ownership," which are reported; or (2) "time or demand deposits," which are not reported.

"Time or demand deposits" include "money market funds." 29 Del. C. § 5804(g). "Money market instruments" are "various sorts of debt securities rather than equities," and "include, *inter alia*, negotiable certificates of deposit, Eurodollar certificates of deposit, commercial paper, banker's acceptances, Treasury bills, and discount notes of certain federal agencies." Couldock & Bohan, Inc., v. Societe General Securities Corp., 93 F. Supp. 2d 220, 223, fn 3(2000)(citing Dictionary of Finance and Investment Terms, p. 339-41 (Downes & Goodman, eds., 4th ed. 1995)); See also, Securities Training Corporation Study Manual, pp. 10-12 thru 10-14 (1994).

As CDs are within the category of "money market funds," under the "time and demand deposit" definition, they need not be reported.

(B) Voluntary Organizations

"Professional organizations" are defined as "an individual engaged in, or an association organized pursuant to, federal or state law for the practice of medicine, law, accounting, engineering or other profession." 29 Del. C. § 5812(I). Professional organizations are reported if the public officer derives income of more than \$5,000 a year from that source. 29 Del. C. § 5813(a)(3). Here, the candidate stated that he is a member of a voluntary organization. Even assuming the organization fell within the meaning of "professional organization," as he received no income, it would not be reported. (*Commission Op. No. 00-31*).

Day-Trading by Spouse

A candidate for State office asked how to properly report her spouse's Internet Account with Schwab when he is a day-trader; the stocks in the account can change daily; and the candidate is not involved in the trading.

Public officers are to report the name, instrument and nature of ownership of "instruments of ownership" which have a "fair market value" in excess of \$5,000, including those which are "constructively controlled." 29 Del. C. § 5813(a)(2). "Constructively controlled" includes "any financial interest of the spouse." 29 Del. C. § 5812(b)(3). "Instrument of ownership" includes "common or preferred stocks." 29 Del. C. § 5812(c). "Fair Market Value"

means “if a security, the quoted price as of January 1 of the year in which the report is filed.” 29 Del. C. § 5812(e).

A literal reading of the statute would appear to require a disclosure of each separate security in the account if the value of that particular security was more than \$5,000 as of January 1, 2000. However, the statute was enacted in 1984. Therefore, the General Assembly, when it directed that common or preferred stocks be disclosed, could not have contemplated how a public officer is to report rapid and constant changes in portfolios managed by day-traders on the Internet.

Delaware Courts have held that where the literal reading of the statute would lead to an absurd or undesirable result, then the words of the statute should be modified to agree with the legislative intent. *Commission Op. No. 96-08 and 96-14* (citing *Law v. Developmental Child Care, Inc.*, Del. Super., 523 A.2d 557, 560 (1987)), *Helfand v. Gambee*, Del. Ch. 136 A.2d 558, 561 (1957); and 2A *Sutherland Stat. Constr.* § 46.07 (5th ed. 1992).

The legislative intent, reflected in the General Assembly’s findings, is that the purpose of the Code is to insure that officials refrain from acting in their official capacity on any matter wherein they have a direct or indirect personal interest that might reasonably be expected to impair objectivity or independent judgment. 29 Del. C. § 5811(2).

Following the literal meaning could lead to the undesirable result that no investment would be disclosed. For example, if each security in the account were less than \$5,000, none would be reported, even though the entire portfolio is worth more than \$5,000. Moreover, as the candidate’s spouse is constantly trading his securities, she would not know on any given day what the individual securities were worth. A less literal reading of the statute would recognize that the “matter” in which she will always know that she has an indirect financial interest is the “Schwab” account. It would be valued at more than \$5,000 on any given day and would, therefore, be reported. Thus, it should be disclosed in Section 1 under the heading “Constructively Controlled,” by the “name, instrument, and nature of ownership,” e.g., spouse’s holdings; Schwab Internet Account, Various Securities, Traded Daily. (*Commission Op. No. 00-35*).

Referral of Suspected Violations

Failure to File Financial

The Commission may refer any suspected violation of the

Disclosure Reports

subchapter on financial disclosure reporting to the Attorney General for investigation and prosecution, subject to the discretion of the Attorney General. 29 Del. C. § 5815(c).

The financial disclosure statute provides that every “public officer” as defined in 29 Del. C. § 5812 shall file a report disclosing financial interests. 29 Del. C. § 5813(a). “Public officer” includes “any candidate who has filed for any state office.” 29 Del. C. § 5812(a)(3). Several candidates for State office did not file a financial disclosure report, after having been notified of the requirement to file and having been notified that “willful failure to file” may constitute a misdemeanor pursuant to 29 Del. C. § 5815(b).

The facts are as follows: The Commission’s staff works with the Commissioner of Elections to insure that the financial disclosure form is included with other candidate registration materials. To insure candidates are aware of the requirement, the Commission also obtains a list of candidates from the Commissioner of Elections. If the candidate has not filed, the Commission’s staff sends the candidate notice of the filing requirement, giving the candidate a date by which to file. If there is no response to the first notice, a second notice is sent by certified mail to insure that the candidate has received the materials. In each instance, both a first and second notice was sent to the candidates.

Beyond the correspondence, the Commission’s Legal Counsel, spoke with one candidate by phone. Subsequently, the candidate came to the Commission’s office and the Commission’s Legal Counsel reviewed the form with the candidate, but no financial disclosure form was filed. (*Commission Op. No. 00-30; 00-43 thru 00-45; 00-47 & 00-48*).

STATE PUBLIC INTEGRITY COMMISSION

Synopses of 2001 & 2002 Financial Disclosure Decisions

What is Reported?

Grand Gala Tickets from a Lobbyist

A Public Officer in the Executive Branch asked about reporting gifts and if it were proper to accept tickets to the Grand Gala from a lobbyist who lobbied his agency. Based on the following law and facts, his acceptance raised an ethical issue.

(A) Financial Disclosure

Public officers must report gifts valued at more than \$250.00 on their annual financial disclosure report. 29 *Del. C.* § 5813(a)(4)(e). Here, the public officer complied with the reporting procedure after accepting tickets to the Grand Gala from a lobbyist.

(B) Was acceptance ethical? Restrictions on Gift Acceptance

State employees may not accept compensation, gifts, payment of expenses, other employment, or any thing of monetary value if it may result in: (1) impaired independence of judgment; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). Also, they may not use public office to secure unwarranted privileges, private advancement or gain. 29 *Del. C.* § 5806(e).

In interpreting similar federal regulations which address having expenses for government employees paid by private parties, the federal Court of Appeals (D.C.) noted that such payments can evoke at least two ethical concerns:

1. When a government employee accepts payment from a private party, it may appear to the public that the employee may be beholden to the private interest and prone to provide regulatory "favours" in return. *Sanjour v. Environmental Protection Agency*, U.S. Ct. of Appeals (D.C.) 567 F.3d 85, 94 (1995).
2. Even if there is no reason to suspect a private

**(C) Lobbyist as Friend
Never Gave Tickets Until
After State Appointment**

payor is trying to curry favor with the employee whose expenses are paid, the employee's acceptance of benefits from a private source may raise the appearance that the employee is using public office to secure privileges or private gain. *Id.*

Here, the tickets were given to him by a lobbyist. He and the lobbyist had been personal friends for years. Despite those years of friendship, the lobbyist had never before offered the officer tickets to events such as the Grand Gala. The officer had recently been appointed to a Senior level executive branch position. His agency had some decision making authority over a company the lobbyist represented. Thus, it appeared the officer was offered the tickets, not because of the longstanding friendship, but because of his State position. We point this out because it focuses on the reason for exercising caution when accepting things of value from a lobbyist.

When an organization is registered to lobby, the registration is a clear indicator that the organization has an interest in official decisions. *Commission Op. No. 99-05 & 99-17*. We have urged public officers to exercise "great caution" in accepting gifts or things of value from entities that have an expressed interest in official decisions. *Id.* Here, the organization represented by the lobbyist had identified its interests in official State decisions through its lobbying registration, and there was a clear connection to its interest in decisions by his department.

His department worked with the organization represented by the lobbyist to negotiate certain State matters that impacted on the agency's budget for one of its divisions. The division's staff puts the proposal together, negotiates with the organization, and then sends the budget to this officer for final approval. There is a substantial amount of money involved. Moreover, if the organization did not fund the division's budget at the level at which his agency had committed, then by federal regulation, the organization would have to shut down, which could cost it about a million dollars each day. Thus, there was significant decision making authority by him relative to the organization, which clearly had a significant interest in his decisions.

**(D) Appearance of
Impropriety**

Thus, the adverse effect on the public's confidence in its government is that the offer could well have been made to curry favor in his decision making. Accordingly, acceptance, at a minimum, would raise an appearance of impropriety. Because he had just been recently appointed to a State position, had promptly reported the acceptance, and sought guidance, the Commission did not impose a penalty. (*Commission Op. No. 01-06*).

**Part of "Payment of
Expenses" is Reportable -
Part is Returnable**

Based on the following law and facts, the Commission concluded that a public officer's trip to an out of State conference, with additional days spent on vacation, with portions of the vacation paid for by a private enterprise, required that the value be reported and that a portion of the value be returned to the private enterprise.

**(A) Financial
Disclosure Reporting**

Public officers must report "gifts" of more than \$250. 29 *Del. C. § 5813(a)(4)(e)*. "Gift" includes payment of expenses. 29 *Del. C. § 5812(o)*. However, payments are not "gifts" if in return the officer gives "consideration of equal or greater value." As shown here, "consideration" by attending courses and/or moderating events, can be considerations of equal or greater value, depending on the circumstances.

**(B) Gift or Sufficient
Consideration?**

In prior opinions, we found "consideration of equal or greater value" where officials attended a conference and most of their time was in official sessions, with little or no personal activities. *See, e.g., Commission Op. No. 99-38* Conversely, where the official sessions were limited, and most of the time was for personal activities such as social events and golf, the "consideration" was "not equal to or greater than" the payment. *Commission Op. Nos. 96-07 & 96-37*. Those are basically the two ends of the extremes. This officer's situation was more "in the middle," and we had not addressed that type of situation. Thus, the officer's decision to seek guidance was very appropriate.

**(1) Motive is not
"consideration"**

The issue is whether the officer gave "consideration of equal or greater value" to the private enterprise for paying expenses of more than \$1,000 for the out of state conference. The officer accepted the offer because the policy issues to be discussed related to the officer's official functions. However, the motive for entering an agreement is distinct and different

from "consideration." *Commission Op. No. 96-26 (citing 17A Am. Jur. 2d Contracts § 115).*

"Consideration" is a "recompense; payment; an act, forbearance or promise given by one party for an act or promise of another." *Commission Op. No. 97-07 (citing 17A Am. Jur. 2d Contracts §§ 113 & 114).* Here, in return for the payment of expenses, the officer agreed to attend a two-day seminar. Merely attending a conference is "some" consideration but not "equal to or greater than" a payment of expenses to attend, depending frequently on the amount of expenses reimbursed. *Commission Op. No. 96-52.* That is because the officer who attends the course and upgrades his knowledge and enhances his skills as a public administrator can receive a greater value than the gift giver. *Id.* Here, in the initial written request, the officer said: "During the conference, I was asked and voluntarily agreed to serve as a moderator for one of the breakfast sessions." An "after the fact" arrangement could not have been an inducement for the officer to accept payment.

**(2) "Gratuitous Act" is not
"consideration"**

Rather, it would be a "gratuitous act;" not "consideration." *See, Black's Law Dictionary, p. 307 (6th ed., 1998).* However, at the Commission meeting, the officer said the agreement to moderate was part of the original offer. Public officers are entitled to a "strong legal presumption of honesty and integrity." *Beebe Medical Center v. Certificate of Need Appeals Board, C.A. No. 94A-01-004, Terry, J. (Del. Super., June 30, 1995), aff'd, Del. Supr., No. 304 (January 29, 1996).* Thus, with that presumption and under the changed facts, the agreement to moderate may be read as an "act or promise" in return for payment and, therefore, would also be "some" consideration.

**(3) Was "some"
consideration of "equal or
greater value"?**

Because attending the seminar and moderating a breakfast session were "some consideration," the next issue is whether the consideration was "equal to or greater than" the value received from the private enterprise's payment of expenses. The private enterprise paid expenses of \$1,665.11 for the officer to attend the two-day conference and moderate a breakfast session. The agenda shows the continental breakfast period was 45 minutes. The officer stayed two more days on vacation, with the private enterprise paying

**(4) "Costs Savings" is
a "financial benefit" -
something of monetary value**

lodging costs. Thus, essentially equal time was devoted to business and to pleasure in return for the payment. The officer's decision to stay over for two nights vacation could have given the private enterprise a "costs savings" on the reduced air fare. However, any "costs savings" it could have realized by the officer's extended stay were eliminated because the private enterprise paid those "savings" toward the officer's vacation lodging costs. The private enterprise then added \$109.00 to cover the remaining cost of the officer's vacation lodging. Thus, the officer personally saved the costs of lodging and any travel that would have been incurred if the officer vacationed in this out of state location and personally paid the costs.

Courts have held that a "costs savings" to an official is a financial benefit. *See, e.g., Davidson v. Oregon Government Ethics Commission*, 712 P. 2d 87 (Ore. Supr., 1985). As the financial disclosure law requires reporting anything of value greater than \$250, "costs savings" of more than \$250 must be reported.

Based on those facts, the greater value accrued to the officer, not the private enterprise. The officer received the value of: (1) the payment of travel to the out of state location and lodging expenses related to the conference; and (2) a further benefit on lodging for personal vacation days. The State of Delaware also received a value in that the conference presumably enhanced the officer's skills as a public administrator. This factor is discussed in the next section of this opinion. In return, the private enterprise received the officer's attendance and service as a moderator at a 45 minute breakfast session. Moreover, it incurred higher costs because the officer stayed for two personal days. As the officer received the greater value, the source and value must be reported as a "gift" on the financial disclosure report.

The Code of Conduct restricts acceptance of gifts, payment of expenses or anything of monetary value if acceptance may result in: (1) impaired judgment in performing official duties; (2) preferential treatment to any person; (3) official decisions outside official channels; or (4) any adverse effect on the public's confidence in the integrity of its government. 29 *Del. C.* § 5806(b). It also restricts State officers from using public

office for personal gain or benefit. 29 Del. C. § 5806(e).

When private sources confer benefits on public officials and those officials are responsible for agency related functions, it may, at least, raise an appearance of impropriety. *Commission Op. No. 97-33 (citing Sanjour v. Environmental Protection Agency, U.S. Court of Appeals (D.C.), 56 F.3d 85, 94 (1995)).* Two ethical issues noted by the Sanjour court were:

(1) when a public official accepts benefits from a private party, it may appear to the public that he may be beholden to the private interest and prone to provide “favors” in return. *Id.*

(2) even if there is no reason to suspect the private party is trying to curry favor with the official, his acceptance of benefits from a private source may raise the appearance that he is using public office for private gain. *Id.*

Here, the officer had no decision making authority over the private enterprise, its membership, or the foundation that finances its activities. Thus, no facts suggest that the officer: (1) in making official decisions could have impaired judgment; (2) could give preferential treatment to the private enterprise; or (3) could make official decisions outside official channels for the private enterprise. Thus, the issue of being beholden to the private interest or providing favors in return is not raised.

(D) Balancing Appearances of Conduct

The issue then is whether there is any appearance of using public office for private gain. To decide if there is an appearance of impropriety, the Commission looks at the totality of the circumstances. *Commission Op. No. 96-78.* Here, some facts diminish the appearance of impropriety. Specifically, the conference was a means to improve the officer’s skills as a public administrator; the officer moderated a 45 minute breakfast session; and the officer attended all sessions during the Tuesday through Thursday conference. The evening activities involved receptions and dinner for the approximately 200 participants, with the Tuesday reception including opening remarks and Wednesday’s reception and dinner including presentations on

conference related matters. Also, no facts show acceptance would impair official judgment; result in preferential treatment or official decisions outside official channels.

We weigh those facts against the ones that may “raise suspicion” among the public of any appearance that public office was used to obtain an unwarranted privilege, private advancement or gain, which is prohibited by 29 Del. C. § 5806(e).

The officer advised the private enterprise that if the return flight was on Sunday rather than Friday, it would save \$255 in airline costs. The private enterprise allowed the officer to apply that \$255 to the lodging costs for two vacation nights. As the lodging costs were \$182 per night, the private enterprise had to cover an additional \$109 for lodging on those nights. ($\$182 \times 2 = \464 minus $\$255 = \109). Thus, the private enterprise paid more because the officer suggested staying over, than if the officer had left as scheduled. Beyond the fact that the officer’s personal vacation made the private enterprise pay more than was originally bargained for, we also consider the fact that the two-day vacation was in a \$182.00 a night room at a “world-class destination resort on 22 coastal acres”, where the room rates went from \$99.00 per night to \$2,500.00 per night. Courts have noted that there is a difference in appearance if a public employee accepts private payment for a bus ride to a nearby city with a box lunch en route, as compared with a lobster dinner and a Lear jet to a far-off resort area. *See, Sanjour, supra*. That is because the latter may raise the appearance that the public employee is using public office to privately benefit. *Id.*

**(E) Ethics Code to Be
Broadly Construed to Serve
Purpose**

The Code’s purpose is to insure that the public’s confidence in its employees and officials is upheld. 29 Del. C. § 5802. Statutes enacted for a public purpose are broadly construed to achieve that purpose. *See, generally, 3A Sands, Sutherland Stat. Constr. Chapt. 71 (5th ed. 1992)*. Adding that purpose to these facts, accepting the additional \$109 beyond the actual expenses of the conference may “raise suspicion” among the public of the appearance of using public office for unwarranted privileges, private advantage or personal gain, in violation of 29 Del. C. § 5806(e).

To resolve the appearance of impropriety, the private enterprise must be reimbursed \$109; the added cost incurred for the personal vacation.

(F) Conclusion - Portion of Value to be Repaid

Based on the above law and facts, we conclude that the value of the payment of expenses, minus the \$109.00, should be reported as a gift on the financial disclosure report, and that \$109.00 should be repaid to the private enterprise to eliminate any appearance of using public office for personal gain. *(Commission Op. No. 02-16).*

Referral of Suspected Violations

Failure to File

Eleven candidates for State office failed to file a financial disclosure report within 14 days of becoming a public officers, as required by 29 Del. C. § 5813(c). Notice was sent by regular and certified mail to advise candidates of the requirement to file. If a public officer willfully fails to file a report, it is a class A misdemeanor. 29 Del. C. § 5815(a).

After the reports were not filed by the time given in the letters, the Commission acted to refer the matters to the Attorney General, as it may file suspected violations with that office to further investigate and determine if the individuals will be prosecuted. 29 Del. C. § 5815(a). *(Commission Op. Nos. 02-44 thru 02-54).*

Failure to File Information on Spouse

Section 5813 of the Financial Disclosure law requires that public officers report assets valued at more than \$5,000 that are “constructively controlled.” 29 Del. C. § 5813(a)(2). “Constructively controlled” includes assets “held jointly with a spouse” or “any financial interest of the spouse.” 29 Del. C. § 5812(b).

A candidate for State office did not indicate if his spouse held the types of financial interest that were required to be reported. The candidate was of the belief that such information should not have to be reported. It was explained that the statute required such information. The candidate was advised that failure to provide information required under Section 5813 could result in criminal penalties. The candidate did not provide the information and signed a statement that he was advised of the reporting requirement. The Commission

referred the suspected violation to the Attorney General's office, pursuant to 29 Del. C. § 5815(c). (*Commission Op. No. 02-43*).

FINANCIAL DISCLOSURE REPORTING

Public Integrity Commission - Synopses of 2003 - 2006 Opinions

Who Must File?

Meaning of “Equivalent”

The Code requires that Cabinet Secretaries and Division Directors and their “equivalents” must file a financial disclosure report. *29 Del. C. § 5812(n)(13) and (14)*.

The Commission was asked if two Department positions were “equivalent to Division Directors,” making them subject to filing a report under the financial disclosure law. Based on the following law and facts, the Commission concluded that the positions are not equivalent. While not equivalent, the Department may adopt a policy that is more stringent than State law and require filings with the agency or this Commission.

I. Applicable Law and Facts

The financial disclosure law requires filings by, among others, Cabinet Secretaries, Division Directors, and “persons of equivalent rank.” *29 Del. C. § 5812(n)(13) and (14)*. The Department believes the following positions are “equivalent” to a Division Director.

(A) Director, Administration: Pay Grade 23; Merit Position; job description says duties include “directing” the Office of Administration; principal contacts are with “other” Division Directors; other State/Federal Administrators, legislators and vendors.

(B) Chief, Office of Occupational & Labor Market Information: Pay Grade 21; Exempt position classified as an Administrative Management position.

The term “equivalent” is not defined by the law. The rules of statutory construction require that interpretations be consistent with the manifest intent of the General Assembly. *1 Del. C. § 301*. If technical words and phrases have a peculiar and appropriate meaning in the law they are construed and understood based on that meaning. *1 Del. C. § 303*. Based on the following, the “peculiar and appropriate” use of Division Directors and heads of “Offices” does not result in “equivalent” positions.

(1) Statutory Organization of the State

The statutory structure of various State agencies shows that "Division Directors" and heads of "Offices" are not equivalent. "Division Director" has a legal and technical meaning, generally understood to be separate and apart from heads of "Offices." "Division Directors" head a statutorily identified "division," giving the term a technical and legal meaning. However, heads of "offices" may be elected or appointed, and may be equivalent in some instances to Cabinet Secretaries and Division Directors, but that "equivalency" is generally included in the statutory terms. *See, e.g.,* Office of the State Auditor (elected head of agency); Office of the Budget (appointed head of agency is "equivalent" to Cabinet Secretary); Chief Administrator of Department of Technology and Information is "Cabinet level," etc. Generally, the chief Administrative officer, is the head of an "Office of Administration." (*all citations omitted*). However, in rare instances, the chief Administrative officer may head up a "Division." *See, e.g., 29 Del. C. § 8805 and 8805 (former Department of Administrative Services; chief Administrative officer, by law, a "Division Director."* Thus, where the General Assembly wanted to identify a position as "equivalent," it has done so.

(2) Department's Statutory Structure:

The statute clearly separates the functions and duties of "Division Directors" and heads of the "Offices." *29 Del. C. § 8503(2)(a) thru (f)*. Moreover, it provides that if the Secretary's position is vacant, the Governor shall have the power to fill the position by appointing "the director of any division of the Department" as acting Secretary. *29 Del. C. § 8502(c)*. By omitting any reference to the heads of either "Office," the implication is that the Division Directors and the heads of "Offices" are not "equivalent" for purposes of appointment to the Secretary's job. Also, the statute gives the Secretary authority to establish, consolidate or abolish "divisions, subdivisions and offices within the Department..." *29 Del. C. § 8502(3)(4)*. A logical reading is that "subdivisions" and "offices" are different from a "division."

(3) Legislative History

The "office" positions were created in 1970. That was 14 years before the financial disclosure law was written. The law presumes that the General Assembly was aware that agencies had both "Divisions" and "Offices," but chose not to include heads of departmental "offices" within the terms.

Division Director's salaries are line items but the heads of

(4) Treatment in State budget

department “offices” generally are not unless they are uniquely equivalent to a Cabinet Secretary or Division Director. The State budget includes line items for this Department’s Division Directors but not the “Offices.” Again, the law does not appear to treat them as “equivalent.”

(5) Treatment by Commission

The Commission dealt with a similar situation where a State employee asked if he was the “equivalent” of a Division Director. Commission Op. No. 97-02. In that opinion, the Commission identified five (5) State positions as “equivalent” to “Division Directors.” This Department’s “offices” are not among them.

II. Conclusion

Historically and legally, heads of “offices” and “Division Directors,” within a Department are not treated as “equivalent.” Consistent with the Commission’s prior ruling, absent legislative action, under these particular facts, the Commission finds that these positions are not equivalent.

Although the disclosure law does not include such positions, the Department can have a policy on which persons should file as long as the policy is not less stringent than the State law. Nardini v. Willin, 245 A.2d 164 (Del., 1968). In adopting a policy, the Department may wish to review laws which identifies the reasons for filing and the constitutional issues that may arise if policies are too expansive. Commission Op. No. 97-10 & 97-12. (Commission Op. No. 05-03).

“Equivalent” to Division Director

After a reorganization of State agencies where personnel from a former Department were absorbed by two other Departments, clarification was sought on whether certain positions were equivalent to “Division Directors” as the reorganization statute did not use “Division Director” titles for the positions. The decision entailed reviewing the statute of the former department and the statutes for the reorganization, which described the statutory duties in the former agency, as compared to statutory language describing their new positions. The actual duties of the officials also were reviewed. As the Commission is required to strive for consistency in its decisions, it also reviewed prior rulings. Further, the Budget law was reviewed to see if the positions were line items in the budget, which are some indicia of their status. It interprets their status only as it relates to 29 Del. C., ch. 58, Subchapter II.

Required to File (A) The following positions are required to file.

(1) Director of the Office of Management and Budget

Must file. "Equivalent" to a Cabinet Secretary.
Commission Op. No. 97-02.

(2) Management Services Administrator

Must file - Official has the same statutory job description as a Division Director while with the Department of Administrative Services (DAS), and, thus, is "equivalent" to a Division Director.

(3) Facilities Management Administrator

Must file. Official has the same statutory job description as a Division Director with DAS, and, thus, is "equivalent" to a Division Director.

(4) Government Support Services Administrator

Must file. Official has the same statutory job description as a Division Director while with DAS and, thus, is "equivalent" to a Division Director.

(5) Human Resource Management Administrator

Must file. With the exception of one paragraph, the official's statutory duties are identical to duties previously performed by the State Personnel Office (SPO) Director. That position was previously equivalent to a Cabinet Secretary. *Commission Op. No. 97-02.* With this reduction in duties, and the fact that a Cabinet Secretary is already in place, the individual is at least the "equivalent" of a Division Director.

(6) Benefits and Insurance Administrator

Must file. This official's statutory duties are identical to part of the duties previously assigned to the SPO Director, which was equivalent to a Cabinet Secretary. *Commission Op. No. 97-02.* As the duties were prior duties of a Cabinet Secretary, and as OMB already has a Cabinet Secretary, this official is at least the "equivalent" of a Division Director.

(7) Statistical Analysis Center Director (SAC)

Must file. The question was not asked about SAC and other entities and whether persons in those agencies were required to file. However, in a prior opinion, the Commission ruled that the SAC Director position is "equivalent" to a Division Director and must file. *Commission Op. No. 97-02.* The opinion resulted from discussions with State Personnel, payroll, etc., in

***Not "Equivalent" - Not
Required to File***

1997. To my knowledge there has been no change in the SAC Director's duties. Absent anything to the contrary, the SAC Director should continue to file.

(B) The following positions are not required to file.

(1) Director of Financial Integration

Not required to file. Unlike the above jobs, this position is not created by statute; is not a line item in the budget; does not have the "Administrator" title; does not have such statutory authority as to act as the Cabinet Secretary in her absence; supervises only one person (the PHRST Director), which is unlike Division Directors and their equivalents, who supervise multiple employees, etc. It is basically the same job held prior to the reorganization, which was not previously found to be a Division Director "equivalent." *Commission Op. No. 97-02*. The primary responsibilities are to oversee OMB's Enterprise Resource Planning projects; work on projects at the direction of the Cabinet Secretary, act as Statewide controller, and manages one time items and contingencies.

(2) Director of Policy and External Affairs:

Not required to file. Position is similar to the above Director's in that the position is not created in Code; not a budget line item; has little or no supervisory authority; and has no authority to act as the Secretary in her absence. This position is held by the former "Deputy Budget Director." Prior to the reorganization, the Budget Office was split into two distinct sections under the Budget Director. The Deputy Budget Director had supervisory responsibility over the financial and policy sections of the office. Several Directors were under this position: Director of Management Efficiency, the Director of Fiscal Operations, the Director of Financial Management and the Chief of Fiscal and Policy Analysis (and the Fiscal/Policy section under the chief). The Commission previously held that Deputies or Principal Assistants to a Cabinet Secretary are not required to file. *Commission Op. Nos. 96-06 and 97-04*. As a result of the reorganization, the responsibilities changed substantially. The position is now part of the Office of the OMB Director. Duties are for press relations; legislative issues; constituent relations; and coordination with the Governor's office on policy issues. One person reports to this position--an administrative management position that serves as the Deputy to this position and also is the Executive Director of the Office of Minority and Women Business Enterprises. While the actual duties in the new position have changed, the new duties are similar to duties usually

performed by Deputies to a Cabinet Secretary. As noted in the Commission's prior opinions, such positions existed before the General Assembly passed the Financial Disclosure Reporting law. *Commission Op. No. 96-06*. As the General Assembly is presumed to know of their existence, there is an inference that the omission was intended. *Commission Op. No. 95-001 (citing Norman v. Goldman, 173 A.2d 607, 610 (Del. Super., 1961))*, see also, e.g., 29 Del. C. § 7903 (2) (statutorily authority to appoint Deputy to Cabinet Secretary is identified separate and apart from Division Directors).

(3) Director of PHRST

Not required to file. The title includes "Director" but, like those above, but a title alone does not make the position "equivalent" to a Division Director. The position is not a line item in the budget law; the supervisory and other responsibilities are not equivalent to those of a division director, etc.; this position not previously held to be Division when it was under the SPO; there are no indicia of her position having authority to assume the Cabinet Secretary's duties in her absence; the news letter discussing the various parts of OMB refers to it as a "section." Under Delaware statutes, when there is reference to such things as "Division," "office," "section," etc., it is presumed to be a smaller unit than a Division. *Commission Op. No.05-03*.

(4) Director of the Office of Pension.

Not required to file. Like the situations above, this position has never been required to file. Moreover, the Commission has held that when the term "office" is listed as a subordinate to a Cabinet Secretary, the term has a legal meaning that makes it something less than a Division. See, *Commission Op. No.05-03*.

This position has existed for years and has never been required to file a financial disclosure report. The Commission has never issued a specific opinion on this position, however, consistent with prior rulings, this office administrator's position does not fall within the meaning of "equivalent" to a Cabinet Secretary or a Division Director.

First, before the reorganization, the Director of State Personnel's statutory authority included a provision that the Director "shall be responsible for the clerical administration of all state pension funds." 29 Del. C. § 5910 (d). The law establishing the duties of the Director's office did not specifically provide for a Division or even an office for the Pension Administrator. A separate law creating a Board of Pension

Trustees, gave that entity: "The power and duty to appoint an Executive Secretary who shall be responsible for determining the eligibility for retirement pension benefits for all state administered pension plans including the determination of eligibility for paraplegic veterans' benefits as provided for in § 1001 of Title 20." 29 Del. C. § 8308(b)(2). The Pension Administrator was hired by and reports to the Board. One indicia of a "Division Director" is that generally as a matter of law, the Division Director reports directly to the head of an agency. Another indicia is that generally a Cabinet Secretary has statutory authority to delegate responsibilities to "division directors," but not to other employees within the agency. See, e.g., 29 Del. C. § 8404(7). As a matter of law, where there were "divisions" and "offices" created by statute, the statute limited the delegation of a Secretary's duties to the "division directors." See, 29 Del. C. § 8503(2) and (6). No statute establishes the pension "office," and no provision permits the OMB Director to delegate Cabinet level duties to the head of the pension "office." Thus, the Pension Administrator's position, at a minimum, lacks those indicia of a "division director."

Under the statute creating the reorganization, OMB's Director has authority:

"To establish, consolidate or abolish such divisions, subdivisions and offices within the Office¹ or transfer or combine the powers, duties and functions of the divisions and other groups within the Office, with the written approval of the Governor, as may deem necessary, provided that all powers, duties and functions required by law shall be provided for and maintained..." 29 Del. C. § 6303A(13)(*emphasis added*).

The plain language of the statute recognizes a clear distinction between divisions, subdivisions and offices: in other words, they are not "equivalent." Rather, the legal structure of the hierarchy identifies "offices" as something less than a division. All words of a statute must be given meaning.

¹It should be noted that there is a separate category of "Offices" (e.g., Office of Budget and Management; Office of the State Auditor, etc.). Those "offices" are sometimes seen in legislation as "Offices"—that is, capitalized; while the subset "office" is generally referred to by lower case. The holder of the "Office" position is generally an elected official or the head of an agency. "Offices" are created by the State Constitution or by statute, while "offices" are the general result of authority given to the agency head to create such entities.

Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991). If an “office” were equivalent to a “division” the term “office” in the ordinary context of the statute would have no meaning.

That statutory structure is not unique to OMB. *See, e.g., 29 Del. C § 7903(7); § 8003 (4); § 8103(5); § 8203(4); 8404(5)(cabinet secretaries’ “power to establish...divisions, subdivisions, and offices” § 8304(4)(“establish...division and offices”).* As the General Assembly has consistently recognized this legal hierarchy, there is a legal presumption that it was aware of and knew the differences between a division and an office when it wrote the legislation that required reporting by “Division Directors” and their “equivalents.” As it knew of such distinctions, but did not require filings by those holding an “office” that was a subset of the agency’s structure, there is a presumption that the omission was intentional. *Commission Op. No. 95-001(citing Norman v. Goldman, 173 A.2d 607, 610 (Del., Super., 1961).*

Third, the responsibilities of the Pension Administrator have not changed as a result of the reorganization. Thus, he is performing the same duties in his “office.” The only change relative to this position is that the Board and the OMB Director now have a combined power to hire and oversee the Pension Administrator. While their powers or duties have been combined, his duties did not change. No facts suggest he has assumed additional duties that would move him up from holding an “office” position to holding a “division” position.

Because of administering the pension plans, when audits are conducted he must disclose or deny any financial interest he has related to those plans as part of the audit. Thus, his disclosure is more specifically related to his job in order to insure that his own financial interests do not recreate a conflict of interest for him. The reports by Division Directors and their equivalents are much broader and not specifically directed at their particular job. (*Commission Op. No. 06-31*).

What Must be Reported: Cases Interpreting Interests to be Disclosed

Financial Interest in Racing Animal

A public officer asked if he were required to report a partial ownership interest in livestock used in the racing industry, and if so, how it should be reported.

Are Livestock Interests

Yes. The source of a financial interest is reported in Section 1 of

Reportable?

the form if: (1) there is a legal or equitable ownership interest; (2) the value exceeds \$5,000 in fair market value or in income; and (3) the financial interest constitutes “an instrument of ownership” or a “business enterprise.”

Here, the public officer was one of several owners of the livestock, with a legal title of ownership registered in Delaware. While income of more than \$5,000 was not received during the reporting year, the fair market value was estimated as more than \$5,000. As he had an ownership interest valued at more than \$5,000, it met the threshold requirements for reporting.

What is the Nature of the Ownership?

The next issue was whether the interest is reported as “an instrument of ownership,” as defined in 29 *Del. C.* § 5812(c), or as a “business enterprise,” as defined in 29 *Del. C.* § 5812(n).

Is the Investment in Livestock an “Instrument of ownership”?

An “instrument of ownership” includes, “but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments.” 29 *Del. C.* § 5812 (c).

A broad reading of the definition could result in the conclusion that the ownership was a “proprietary interest.” That term generally defines an interest of a property owner with all rights appurtenant thereto. *Black’s Law Dictionary*, p. 1219 (6th ed. 1998). Delaware recognizes certain legal rights of owners of registered racing animals. *See, e.g.*, 3 *Del. C.* § 10032; 30 *Del. C.* § 2305; *Belote v. Del. Standardbred Dev. Fund*, Del. Ch., C.A. No. 985, *Hartnett III*, V.C. (November 18, 1982).

As a registered owner, the officer would have the pertinent rights. However, in interpreting the definition “instrument of ownership,” the Commission has held that the terms are to be construed to include objects similar to those specifically enumerated. *Commission Op. No. 99-14* (citing *Triple C Railcar Service, Inc. v. City of Wilmington*, Del. Super., C.A. No. 90C-FE-101, *Gebelein, J.* (September 17, 1992)). The enumerated terms in “instrument of ownership” deal with various types of securities that carry conversion privileges. *Id.* “Proprietary interests” in securities generally means the owners have the right to vote shares of stock and to participate in managing. *Black’s Law Dictionary*, p. 1219 (6th ed. 1998). No facts indicated the ownership was the type generally enumerated

in this particular definition, e.g., stocks, bonds, etc.

***Is the Investment a
“Business Enterprise”?***

“Business enterprise” means “corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession.” 29 Del. C. § 5812(n). One criterion of “business enterprise” is that the person holds a “position of management.” *Id.* Management positions include “officer, director, partner, proprietor or other managerial position.” 29 Del. C. § 5812(d).

The public officer and the other owners had not created a “corporation” or “partnership.” As there was more than one owner, it was not a “sole proprietorship.” However, “business enterprise” includes the broad words: “any other individual carrying on a business or profession,” and “position of management” includes “proprietor.” Delaware law establishes an occupation tax on certain racing animal owners. *See, e.g.,* 30 Del. C. § 2305. It is a form of excise tax imposed on persons **for the privilege of carrying on business**, trade or occupation. *Black’s Law Dictionary*, p. 1079 (6th ed. 1998)(*emphasis added*). Further, a proprietorship means the legal right and title of ownership of a business, usually unincorporated and owned and controlled by a person(s). *Id.* at p. 1220.

***Interpretation of Similar
Federal Law***

Aside from fitting within the terms of “business enterprise,” the federal financial disclosure law is similar: requiring disclosure of identity and category of any interest in property held during the preceding calendar year in a trade or business or for investment or income with a fair market value of more than \$1,000 as of the close of the preceding calendar year . . . 5 *U.S.C. App.* § 102. That law has been interpreted to include reporting of “livestock owned for commercial purposes.” 5 *C.F.R. Part* 2634.301(b). Under the rules of statutory construction, interpretation of one statute may assist in interpretation of another statute where they apply to similar persons, things or relationships. 2*B Sands, Sutherland Stat. Constr.* § 53.02 (5th ed. 1992); 2*A Sands, Sutherland Stat. Constr.* § 45.15 (5th ed. 1992)(*decision on a point of statutory construction has relevance as precedent if the language of one statute has been incorporated in another or both statutes are such closely related subjects that consideration of one would naturally bring the other to mind*).

Conclusion

As the public officer had a financial interest valued at more than \$5,000 fair market price which was apparently taxed for the privilege of carrying on a business, and he held a managerial position as a "proprietor," that interest is to be reported in Section 1 of the financial disclosure report under "business enterprise," indicating the source of the interest and listing the "position of management" as a "proprietor" with others. *Commission Op. No. 03-05.*

Spouse's Student Loans

Are a spouse's student loans, which are solely in her name, to be reported by the public officer?

No. Public officers need not report creditors (**debts**) that are **solely** the spouse's. However, if the public officer is also indebted to the creditor (e.g., joint debt), he must report the creditor. *Comm. Ltr. Op. January 27, 1995.*

The Commission has held that in interpreting the statute, it looks first to the language. *Financial Disclosure Op. No. 95-001 (citing Goldstein v. Muni. Court, Del. Super., C.A. No. 89A-AP-12, J. Gebelein (January 7, 1991))*. The statute only requires the officer to report the spouse's sole financial interests in the asset section "instruments of ownership, business enterprises, and professional organizations."

The asset provision requires public officers to report "constructively controlled" financial interests. 29 *Del. C.* § 5813(a)(3). "Constructively controlled" includes "any financial interest of the spouse or minor child of a public officer." 29 *Del. C.* § 5812(b). While the law clearly requires public officers to report sources of a spouse's assets, the debt section refers only to the "public officer's" creditors. The public officer is to report:

"Each creditor to whom the **public officer** was indebted for a period of 90 consecutive days or more during the preceding calendar year in an aggregate amount in excess of \$1,000." 29 *Del. C.* § 5813(a)(5).

Unlike the asset section, the debt section does not refer to creditors that are solely the spouse's. It refers only to the "public officers'" creditors. The definitions of "public officer" do not include spouses. 29 *Del. C.* § 5812(n)(1)-(17).

The Commission has held that where the persons and things to which the statute refers are affirmatively or negatively designated, the inference is that all omissions were intended. *Financial Disclosure Op. No. 95-001* (citing *Norman v. Goldman*, 173 A.2d 607, 610 (Del. Super., 1961)). The Commission is to be consistent in its opinions. 29 *Del. C.* § 5809(5).

The legislative history also shows that "constructively controlled" was intentionally moved to only the assets section.

Initially the legislation required public officers to report any "constructively controlled" financial interests "as hereinafter provided." *House Bill 83*, § 5862 (1), *January 27, 1983*, p.4, line 31. The statute then listed the categories as: instruments of ownership; business enterprises; income; capital gains; reimbursements; honoraria and creditors. *H.B. 83*, § 5862 (1)(a)-(e), *January 27, 1983*. In April, substitute legislation was introduced. *House Substitute 1 to H.B. 83*, *April 17, 1983*. The substitute legislation moved the term "constructively controlled" from § 5862 (1), which governed reporting requirements for all categories. It was moved to § 5862 (1)(b)&c. Those two sections govern reporting of instruments of ownership, business enterprise and professional organizations. *H.S. 1 to H.B. 83*, *April 17, 1983*, p. 5, line 25; p. 6, lines 8 & 9. Later, the General Assembly dealt again with an amendment to "constructively controlled." *House Amendment 1 to H.S. 1 to H.B. 83*, *June 7, 1983*. That action was a technical amendment, merely dividing the definition of "constructively controlled" into three sub-paragraphs. *H.A. 1 to H.S. 1 to H.B. 83*, *June 7, 1983*, p. 1, lines 17-20 & page 2, lines 1-7.

The legislative history shows the General Assembly worked extensively with this legislation: 18 House amendments, and at least 2 Senate amendments to the substitute legislation. The history also supports the legal presumption that the General Assembly was aware of the statutory language and specifically limited "constructively controlled" to only the asset section. *Commission Op. No. 04-05*.

Social Security Benefits

Are Social Security benefits to be reported on the financial disclosure report as "income?"

Yes, Social Security benefits should be reported as a source of income if the amount exceeds \$1,000 in the reporting year. That conclusion is based on the following:

Public officers must report the source of **any** income for services rendered if the amount exceeds \$1,000 from a single source. 29 *Del. C. § 5813(4)(a)* (*emphasis added*). The purpose of the financial disclosure law is to instill the public's faith and confidence in the representatives of its government. 29 *Del. C. § 5811*. The Commission has followed the general rule of law that statutes with a public purpose are liberally construed to achieve that purpose. *Financial Disclosure Op. No. 95-004* (citing 3A *Sands, Sutherland Stat. Constr.*, Chapter 71 (5th ed. 1992)). Based on that purpose and the plain language of the statute, the Commission has held that the term "any" is all inclusive. *Financial Disclosure Op. No. 95-006* (common meaning of "any" includes "every - used to indicate selection without restriction," *Webster's Seventh New Collegiate Dictionary*, p. 40 (1967)).

In applying the statute's plain language and purpose, the Commission has held that if the payment is based on wages, the source of the payment is to be reported under "income." (*Commission Op. No. 96-68(C)*) (*workers' compensation is reported as income, as a portion of the payment is derived from "wages."*). That is because "income derived for services rendered" includes salary, wages, consulting fees and professional services. *Id.* (citing 29 *Del. C. §§ 5813(a)(4)(a)* and *5812(j)*). Like workers' compensation, Social Security payments are derived, in part, from "wages." In *Op. No. 96-68*, the Commission also factored in that the standard for reporting "income" under the Internal Revenue Code (IRC) includes reporting workers' compensation as "income." *Id.* Likewise, the IRC standard includes Social Security as "income." See, e.g., *IRS Tax Topics*, "Topic 423 - Social Security and Equivalent Railroad Retirement Benefits"; *IRS Publication 915*; *Form 1040*, "Income" ¶ 20a; and *Form 1040 Instructions*, Lines 20a and 20b.

Based on the statutory language and purpose, and the Commission's prior interpretation of "income," it concluded that Social Security benefits should be reported as a source of "income" in Section 3(a) of the financial disclosure reporting

form. *Commission Op. No. 04-06.*

Campaign Contributions are not reported as “Gifts”

An elected official received notice that lobbyists, on their lobbying expense report, listed political contributions as “gifts” to him. He asked if that information was properly listed by the lobbyists as a “gift.” He also asked if he must report the same information as a “gift” under the financial disclosure law.

Under the lobbying law, “gift” “shall not include a political contribution otherwise reported as required by law.” 29 *Del. C. § 5812(h)*. Thus, lobbyists should not report campaign contributions as a “gift.” Similarly, the financial disclosure report filed by public officers specifically excludes political contributions that are reported pursuant to other laws. 29 *Del. C. § 5812(h)*. Political contributions are reported pursuant to the filing requirements with the Board of Elections. 15 *Del. C. ch. 80*. Thus, the public officers do not report campaign contributions as “gifts” under the financial disclosure law, but file pursuant to the Elections law with the Elections Board. *Commission Op., January 14, 2005.*

Referrals of Suspected Violations

Failure to File

“Public Officers” are to file financial disclosure reports not later than 14 days after becoming a public officer, and on February 15 of each year thereafter. 29 *Del. C. § 5813(c)*.

“Public officer” includes “any candidate who has filed for any State office.” 29 *Del. C. § 5812(a)(3)*. Further, certain specified appointees to Boards or Commissions must file. *See, e.g., 29 Del. C. § 5812(a)(12) and 4 Del. C. § 306(c)(3).*

Previously, one candidate for State office and two appointees to a State Commission failed to file a report after notice by regular mail, certified mail, and other attempts, e.g., phone calls, discussions with a Senior level official, etc. Subsequently, in 2006, six candidates failed to file.

“Any public officer who willfully fails to file a report... shall be guilty of a class B misdemeanor.” 29 *Del. C. § 5815(a)*. The Commission may refer suspected violations to the Attorney General for investigation and prosecution. 29 *Del. C. § 5815(c)*. The matters were referred to the Attorney

General's office. After additional notices from that office, one of the individuals filed; another contacted the AG's office and advised that due to an illness the public officer was resigning from the appointed position. The candidate, who was not subsequently elected, also apparently had some medical reasons for not filing. The candidate's spouse asked that the candidate not be required to file.



[§ 5811.](#) | [§ 5812.](#) | [§ 5813.](#) | [§ 5814.](#) | [§ 5815.](#) | [§ 5816.](#)

TITLE 29

State Government

Public Officers and Employees

CHAPTER 58. LAWS REGULATING THE CONDUCT OF OFFICERS AND EMPLOYEES OF THE STATE

Subchapter II. Financial Disclosure

§ 5811. Findings.

The General Assembly finds and declares that:

(1) In our democratic form of government, persons serving in state government hold positions of public trust which require rigorous adherence to the highest standards of honesty, integrity and impartiality.

(2) In order to insure propriety and preserve public trust, a public official or employee should refrain from acting in an official capacity on any matter wherein the employee or official has a direct or indirect personal financial interest that might reasonably be expected to impair objectivity or independence of judgment, and should avoid even the appearance of impropriety.

(3) A disclosure of the personal financial interests of public officials will serve to guard against conduct violative of this public trust and to restore the public's faith and confidence in representatives of its government.

History

(64 Del. Laws, c. 110, § 1; 70 Del. Laws, c. 186, § 1.)

§ 5812. Definitions.

(a) "Business enterprise" means corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession.

(b) "Capital gain" means capital gains required to be reported to the Internal Revenue Service pursuant to federal internal revenue laws.

(c) "Commission" means the State Public Integrity Commission.

(d) "Constructively controlled" means:

(1) A financial interest in the name of another which is controlled by a public officer by virtue of any relationship of the public officer to another person and which directly benefits the public officer;

(2) Any financial interest of a public officer held jointly with the spouse or child of such public officer;

(3) Any financial interest of the spouse or minor child of a public officer.

(e) "Debt instrument" means bonds, notes, debentures, mortgages or other securities having a fixed yield if not convertible to equity instruments.

(f) "Equity instrument" means any ownership interest in a corporation or other legal entity giving rights to the holder upon liquidation of the entity.

(g) "Fair market value" means, if a security, the quoted price as of January 1 of the year in which the report required by § 5813 of this title is filed, or, if not a security, the price at which the public officer would sell as of January 1 of the year in which the report required by § 5813 of this title is filed.

(h) "Gift" means a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received. "Gift" shall not include a political contribution otherwise reported as required by law, a commercially reasonable loan made in the ordinary course of business, or a gift received from a spouse or any relative within the 3rd degree of consanguinity of the person or person's spouse or from the spouse of any such relative.

(i) "Honoraria" means fees received for speeches, written articles and participation in discussion groups and similar activities, but does not include reimbursement for expenses.

(j) "Income for services rendered" means income from a single source and includes salary, wages, consulting fees and professional services.

(k) "Instrument of ownership" includes, but is not limited to, common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds and debt instruments, if convertible to equity instruments.

(l) "Position of management" means officer, director, partner, proprietor or other managerial position in a business enterprise.

(m) "Professional organization" means an individual engaged in, or an association organized pursuant to, federal or state law for the practice of medicine, law, accounting, engineering or other profession.

(n) (1) "Public officer" shall mean:

a. Any person elected to any state office; and

b. Any person appointed to fill a vacancy in an elective state office; and

c. Any candidate who has filed for any state office; and

- d. The Research Director and Controller General of the Legislative Council;
and
- e. The Chief Justice and Associate Justices of the Supreme Court; and
 - f. The Chancellors and Vice-Chancellors of the Court of Chancery; and
 - g. The President Judge and Associate Judges of Superior Court; and
 - h. The Chief Judge and Associate Judges of Family Court; and
 - i. The Chief Judge and Resident Judges of the Court of Common Pleas; and
 - j. The Chief Magistrate and justices of the peace; and
 - k. The State Court Administrator and the administrators of Superior Court, Family Court, the Court of Common Pleas, and the Justice of the Peace Courts; and
 - l. The Public Guardian, the Executive Secretary of the Violent Crimes Compensation Board, the Executive Director of the Child Placement Review Board; and
 - m. All Cabinet Secretaries and persons of equivalent rank within the Executive Branch; and
 - n. All division directors and persons of equivalent rank within the Executive Branch; and
 - o. The State Election Commissioner and the Administrative Directors and Assistant Administrative Directors of the Department of Elections; and
 - p. The State Fire Marshal and the Director of the State Fire School; and
 - q. The Adjutant General of the Delaware National Guard; and
 - r. The Alcoholic Beverage Control Commissioner and the members of the Appeals Commission, pursuant to 4 Del.C. § 306(c) of Title 4.

(2) For purposes of this subchapter, the term "public officer" does not include elected and appointed officials of political subdivisions of the State, of public school districts of the State, and of state institutions of higher learning.

(o) "Reimbursement for expenditures" means any payments to a public officer for expenses incurred by that public officer.

(p) "Time or demand deposits" means checking and savings account in banks or deposits or share in savings and loan institutions, credit unions or money market funds.

History

(64 Del. Laws, c. 110, § 1; 64 Del. Laws, c. 223, § 1; 67 Del. Laws, c. 418, § 1; 69 Del. Laws, c. 467, § 20; 71 Del. Laws, c. 176, § 35; 72 Del. Laws, c. 190, § 4; 72 Del. Laws, c. 338, § 6; 75 Del. Laws, c. 57, §§ 1-3.)

Annotations

Effect of amendments. - 75 Del. Laws, c. 57, effective June 23, 2005, redesignated former (n)(1) to (n)(17) as present (n)(1)a. to (n)(1)q.; and inserted (n)(1)r. and present (n)(2) and made related stylistic changes.

§ 5813. Report disclosing financial information.

(a) Every public officer as defined in § 5812 of this title shall file a report disclosing financial interests, as hereinafter provided. Each report shall be on a form prescribed by the Commission, shall be signed by the public officer and shall include at least the following information:

(1) The name and position of the public officer; and

(2) The name, instrument and nature of ownership, and any position of management held by, or constructively controlled by, the public officer in any business enterprise in which legal or equitable ownership is in excess of \$5,000 fair market value or from which income of more than \$5,000 was either derived during the preceding calendar year or might reasonably be expected to be derived during the current calendar year. Time or demand deposits in a financial institution, or any debt instrument having a fixed yield shall not be listed unless convertible to an equity instrument; and

(3) The name, address and type of practice, without reference to the identity of any individual clients served, of any professional organization in which the public officer is the sole practitioner, officer, director or partner, or serves in any advisory capacity, or which is constructively controlled by the public officer, from which income of more than \$5,000 was either derived during the preceding year or might reasonably be expected to be derived during the current calendar year; provided, however, that any such organization construed as a business enterprise and reported pursuant to paragraph (2) of this subsection need not be reported under this subsection; and

(4) The source of each of the following items received during the preceding calendar year, or reasonably expected to be received during the current calendar year:

a. Any income derived for services rendered exceeding \$1,000 from a single source, unless such income is otherwise identified pursuant to paragraph (2) or (3) of this subsection; or

b. Any capital gain exceeding \$1,000 from a single source other than from the sale of a residence occupied by the public officer; or

c. Any reimbursement for expenditures exceeding \$1,000 from a single source; or

d. Any honoraria; or

e. Any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance with this gift reporting obligation, the recipient may rely in good faith upon the representation of the source of the gift as to the gift's value; and

(5) (a) Each creditor to whom the public officer was indebted for a period of 90 consecutive days or more during the preceding calendar year in an aggregate amount in excess of \$1,000.

(b) Each report required by this section shall contain a certification by the public officer that the officer has read the report, and that to the best of the officer's knowledge and belief it is true, correct and complete, and that the officer has not and will not transfer any assets, interests or property for the purpose of concealing it from disclosure

while retaining an equitable interest therein.

(c) Not later than 14 days after becoming a public officer as defined in § 5812 of this title, the report required by this subchapter shall be filed. Thereafter, the report shall be filed on February 15 of each year.

(d) Each report required by this section shall be filed with the Commission.

History

(64 Del. Laws, c. 110, § 1; 67 Del. Laws, c. 418, § 2; 69 Del. Laws, c. 467, §§ 21-23; 70 Del. Laws, c. 186, § 1; 75 Del. Laws, c. 57, §§ 4, 5.)

Annotations

Effect of amendments. - 75 Del. Laws, c. 57, effective June 23, 2005, deleted "shall be notarized" following "officer" in the second sentence of the introductory paragraph of (a); and deleted "sworn" preceding "certification" in (b).

§ 5814. Retention of reports.

(a) The Commission shall keep the reports required by this subchapter on file for so long as the person submitting such report is a public officer of this State, as defined in § 5812 of this title, and for at least 5 years thereafter. All reports on file with agencies other than the Commission as of January 15, 1995 shall be transferred to the Commission by April 15, 1995.

(b) The reports filed pursuant to this subchapter shall be made available at reasonable hours for public inspection and copying pursuant to Chapter 100 of this title.

History

(64 Del. Laws, c. 110, § 1; 69 Del. Laws, c. 467, § 24.)

§ 5815. Violations; penalties; jurisdiction of Superior Court.

(a) Any public officer who willfully fails to file a report in violation of § 5813 of this title shall be guilty of a class B misdemeanor.

(b) Any public officer who knowingly files any report required by § 5813 of this title that is false in any material respect shall be guilty of a class A misdemeanor.

(c) The Commission may refer to the Commission Counsel for investigation and/or may refer any suspected violation of this subchapter to the Attorney General for investigation and prosecution; provided however, that the Commission shall refer any suspected violation of this subchapter by a member of the General Assembly or the Judiciary to the Attorney General, who shall have the exclusive authority to investigate and prosecute or otherwise recommend remedies or sanctions for such suspected violation.

(d) Superior Court shall have jurisdiction over all offenses under this subchapter.

History

(64 Del. Laws, c. 110, § 1; 69 Del. Laws, c. 467, § 25.)

§ 5816. Protection of confidentiality.

Nothing contained in this subchapter shall be construed as requiring the disclosure of any fact the confidentiality of which is protected by any applicable federal or state law.

History

(64 Del. Laws, c. 110, § 1.)

STATE OF DELAWARE



VOID

EXECUTIVE DEPARTMENT
DOVER

EXECUTIVE ORDER
NUMBER FIVE

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES

RE: GIFTS AND PAYMENTS BY PRIVATE INTERESTS
TO MEMBERS OF THE EXECUTIVE BRANCH

WHEREAS, pursuant to Article III, Section 1 of the Constitution of 1897, the Governor possesses the supreme executive powers of the State; and

WHEREAS, pursuant to chapter 58, title 29 of the Delaware Code, a code of conduct does exist for all employees within the Executive Branch; and

WHEREAS, it is in the best interests of members of the Executive Branch and the people of the State of Delaware for some mechanism to be in place to further insure that circumstances do not arise which create appearances of impropriety or call into question actions of senior members of the Executive Branch;

WHEREAS, this public purpose can be achieved by the promulgation of an executive order that requires senior officials of the Executive Branch to disclose more information regarding their activities than the law requires and by requiring those officials to obtain ethics clearance before accepting gifts with a large monetary value.

NOW, THEREFORE, I, THOMAS R. CARPER, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby declare and order that:

1. Each cabinet secretary, each division director and each person of equivalent rank within the Executive Branch shall file a report disclosing certain financial interests as provided below. The report shall be made as an addendum to section 3(E) of the form prescribed by the Controller General pursuant to 29 Del. C. § 5813, shall be filed at the same time as the report required by 29 Del. C. § 5813, shall be signed by the public officer, shall be notarized and shall include at least the following information:

(a) The source of any gift or gifts received by the public officer during the preceding calendar year which in the aggregate have a value in excess of \$100.00, provided, however, that in the addendum for calendar year 1993 which is to be filed on or before February 15, 1994, no gifts received before June 1, 1993 need be included; and

(b) The date, value and nature of each such gift.

2. For purposes of this Order, "value" means the price paid for the gift by the source of the gift. However, with respect to an invitation received to an event held by an organization which qualifies as a charitable organization under the federal tax laws, the "value" is the portion of the ticket price which is not deductible by the purchaser for purposes of the federal tax laws. Furthermore, with respect to an invitation received to an event held by an organization other than a charitable organization (such as a citizens' group, a community organization or a trade association), the "value" shall be that portion of the ticket price which reflects the per person cost to the sponsoring organization to hold the event (that is, the ticket price minus that portion of the ticket price that contributes to the sponsor's net profits from holding the event).

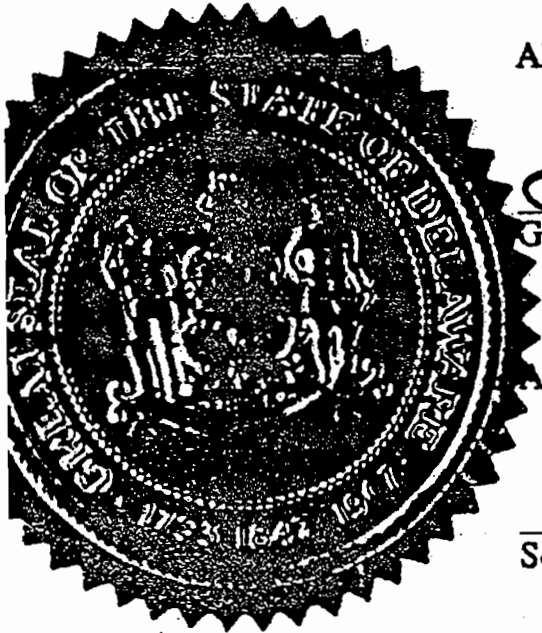
3. For purposes of this Order, "gift" has the definition set forth in by 29 Del. C. § 5812(o), and includes meals, travel and tickets to social, theatrical, musical and sporting events unless lawful consideration of equal or greater value is received. For purposes of this Order, "gift" shall not include free admission to any event held within the State of Delaware at which the recipient is asked to address those in attendance. In such a situation, the public officer's agreement to speak at the event is considered lawful consideration of equal or greater value than free attendance at that event.

4. For purposes of this Order, "source" means any person, as defined by 29 Del. C. § 5804(6), who provides a gift to a public officer and includes any group of persons who act in concert to provide a gift to a public officer. However, the definition of source does not alter the definition of "gift" in 29 Del. C. § 5812(o), which expressly excludes from the definition of "gift" things of value received from a spouse or any relative within the 3rd degree of consanguinity of the public officer or the public officer's spouse or from the spouse of any such relative.

5. No cabinet secretary, division director or person of equivalent rank within the Executive Branch shall accept a gift from any source which has a value in excess of \$250.00 without the prior approval of the State Ethics Commission. Any application for prior approval shall be made as an application to the State Ethics Commission for an advisory opinion pursuant to 29 Del. C. § 5807.

6. This Order be circulated by all cabinet secretaries to persons within their agencies covered by this Order.

APPROVED this 10th day of May, 1993.



Thomas R. Carper

Governor

ATTEST:

William T. Zuller

Secretary of State

STATE OF DELAWARE



**EXECUTIVE DEPARTMENT
DOVER**

**EXECUTIVE ORDER
NUMBER NINETEEN**

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES
**RE: AMENDMENT OF EXECUTIVE ORDER NUMBER FIVE DEALING
WITH GIFTS AND PAYMENTS BY PRIVATE INTERESTS
TO MEMBERS OF THE EXECUTIVE BRANCH**

WHEREAS, Executive Order Number Five was promulgated on May 10, 1993 because it is in the public interest for some mechanism to be in place to insure that circumstances do not arise which create appearances of impropriety or call into question actions of senior members of the Executive Branch; and

WHEREAS, Executive Order Number Five advanced this public interest by requiring senior officials of the Executive Branch to disclose more information regarding their activities than the law requires; and

WHEREAS, section five of Executive Order Number Five states: "No cabinet secretary, division director or person of equivalent rank within the Executive Branch shall accept a gift from any source which has a value in excess of \$250.00 without the prior approval of the State Ethics Commission. Any application for prior approval shall be made as an application to the State Ethics Commission for an advisory opinion pursuant to 29 Del. C. § 5807."; and

WHEREAS, it has turned out to be impractical to require prior approval of a gift or payment over \$250.00 by the State Ethics Commission ("Commission") because the Commission normally meets only once a month and following section five of the Order requires the Commission to act under extreme time pressure in non-exigent circumstances; and

WHEREAS, the purpose of section five can be accomplished in a more cost-effective and convenient fashion by requiring notice, rather than prior approval, of gifts in excess of \$250.00, thereby allowing the Commission to investigate gifts that the Commission believes raise ethical questions but not requiring the approval of every such gift in advance of receipt.

NOW, THEREFORE, I, THOMAS R. CARPER, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby declare and order that:

1. Executive Order Number Five is amended to strike the text of section five and insert in lieu thereof the following language: "Any cabinet secretary, division director or person of equivalent rank who shall accept a gift from any source which has a value in excess of \$250.00 shall provide notice to the State Ethics Commission of the gift, its nature, its source, and its value within 30 days of receipt of the gift."

2. This Order be circulated by all cabinet secretaries to persons within their agencies covered by this Order, along with an attached copy of Executive Order Number Five.



APPROVED this _th day of March, 1994.

Thomas R. Carper
Governor

ATTEST:

William T. Miller
Secretary of State



State of Delaware
Office of the Governor

Ruth Ann Minner
Governor

EXECUTIVE ORDER NO. 8

WHEREAS it is important that representatives of the Governor's office be subject to the same rigorous ethical standards as other state employees; and

WHEREAS it is also important that Delawareans have prompt and easy access to information regarding gifts that high-level executive branch officials may receive;

I, Ruth Ann Minner, Governor of the State of Delaware, hereby ORDER on this Eighteenth Day of January, 2001:

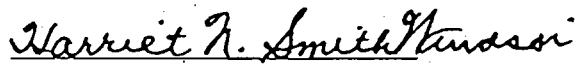
1. All cabinet level officials, division directors, and executive department staff persons holding equivalent rank, shall comply with the applicable ethics requirements outlined in Title 29, Chapter 58 of the Delaware Code.
2. With respect to gift disclosures as required in 29 Del.C. § 5813(a)(4)(e), cabinet level officials, division directors, and executive department staff persons holding equivalent rank shall report such gifts on the first day of April, July, October, and January to the Office of the Governor. Those gifts will be posted

on the Governor's website within ten business days after receipt thereof.

3. Executive Order Numbers 5 and 19, dated May 10, 1993 and March 11, 1994, are hereby rescinded.


RUTH ANN MINNER

Attest:


Harriet N. Smith Windsor
Secretary of State

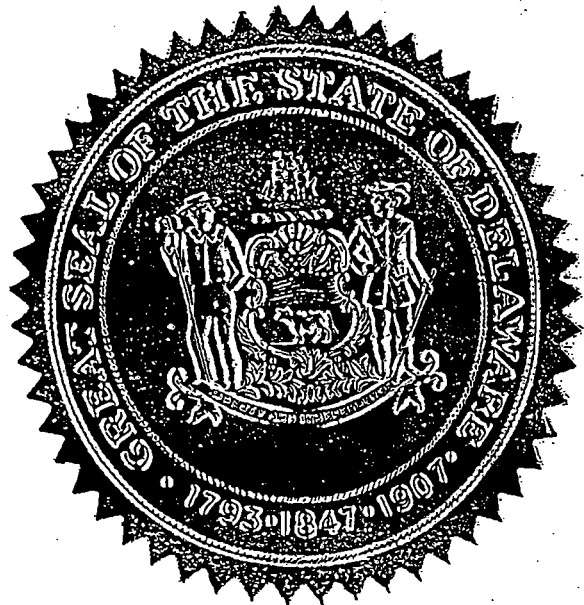


TABLE OF CONSANGUINITY

Showing Degrees of
Relationships

NUMBERS SHOW DEGREE OF RELATIONSHIP

					Great-Great ⁴ Grand Parents
				Great ³ Grand Parents	Great-Grand ⁵ Uncles/Aunts
		Grand Parents ²	Great ⁴ Uncles/Aunts	First Cousins ⁶ Twice Removed	
	Parents ¹	Uncles/Aunts ³	First Cousins ⁵ Once Removed	Second Cousins ⁷ Once Removed	
★Public Officer/Spouse	Brothers ² Sisters	First Cousins ⁴	Second Cousins ⁶	Third Cousins ⁸	
Children ¹	Nephews ³ Nieces	First Cousins ⁵ Once Removed	Second Cousins ⁷ Once Removed	Third Cousins ⁹ Once Removed	
Grand ² Children	Grand ⁴ Nephews/Nieces	First Cousins ⁶ Twice Removed	Second Cousins ⁸ Twice Removed	Third Cousins ¹⁰ Twice Removed	
Great-Grand ³ Children	Great-Grand ⁵ Nephews/Nieces	First Cousins ⁷ Thrice Removed	Second Cousins ⁹ Thrice Removed	Third Cousins ¹¹ Thrice Removed	

★Public Officers need not report gifts from: (1) spouses; (2) officer's/spouse's relatives within the 3rd degree of consanguinity; or (3) the spouses of such relatives. 29 Del. C. § 5812(o).

INSTRUCTIONS FOR FINANCIAL DISCLOSURE REPORT

1. Public officers must file (not postmark) a report not later than fourteen (14) days after becoming a public officer or on **February 15** of each year. *29 Del. C. § 5813(c)*.
2. Pursuant to *29 Del. C. § 5812(n)*, the following persons are "Public Officers":
 - any person elected to any State office
 - any person filling a vacancy in an elective State office
 - any candidate who has filed for any State office
 - Research Director and Controller General of the Legislative Council
 - Chief Justice and Associate Justices of the Supreme Court
 - Chancellors and Vice Chancellors of the Court of Chancery
 - President Judge and Associate Judges of Superior Court
 - Chief Judge and Associate Judges of Family Court
 - Chief Judge and Resident Judges of the Court of Common Pleas
 - Chief Magistrate and Justices of the Peace
 - State Court Administrator and Administrators of Superior Court, Family Court, the Court of Common Pleas, and the Justice of the Peace Courts
 - Public Guardian; Executive Secretary, Violent Crimes Compensation Board; Executive Director, Child Placement Review Board
 - Cabinet Secretaries, Division Directors, and persons of equivalent rank within the Executive Branch
 - State Election Commissioner and the Administrative Directors and Assistant Administrative Directors of the Department of Elections
 - State Fire Marshal and Director, State Fire School
 - the Adjutant General of the Delaware National Guard
 - Delaware Alcoholic Beverage Control (ABC) Commissioner and ABC Appeals Commission members
3. The amount of income, value or degrees of ownership need not to be disclosed, except that the value of gifts must be disclosed. *29 Del. C. § 5813(a)(4)(e)*.
4. If additional space is needed, use a separate piece of paper.
5. In Section 4, indicate the date at which the information is established, e.g., as of January 31, 1996.
6. The report is subject to public inspection. *29 Del. C. § 5814(b)*.
7. Submit the report to:

**State Public Integrity Commission
Margaret O'Neill Building, Second Floor,
410 Federal Street, Suite 3
Dover, Delaware 19901**

**Phone: (302) 739-2399
FAX: (302) 739-2398**

DEFINITIONS

1. Definitions for Section 1:

- **“Fair market value”** means, if a security, the quoted price as of January 1 of the year in which the report is filed, or, if not a security, the price at which the public officer would sell as of January 1 of the year in which the report is filed. *29 Del. C. § 5812(g).*
- **“Instrument of ownership”** includes, but is not limited to common or preferred stock, rights, warrants, articles of partnership, proprietary interest, deeds, and debt instruments, if convertible to equity instruments. *29 Del. C. § 5812(k).*
- **“Business Enterprise”** means corporation, partnership, sole proprietorship or any other individual or organization carrying on a business or profession. *29 Del. C. § 5812(a).*
- **“Position of management”** means officer, director, partner, proprietor, or other managerial position in a business enterprise. *29 Del. C. § 5812(l).*
- **“Professional organization”** means an individual engaged in, or an association organized pursuant to, federal or State law for the practice of medicine, law, accounting, engineering, or other profession. *29 Del. C. § 5812(m).*
- **“Constructively controlled”** means:
 - (a) a financial interest in the name of another which is controlled by a public officer by virtue of any relationship of the public officer to another person which directly benefits the public officer;
 - (b) any financial interest of a public officer held jointly with the spouse or child of such public officer;
 - (c) any financial interest of the spouse or minor child of a public officer. *29 Del. C. § 5812 (d).*
- **“Time or demand deposits”** means checking and savings accounts in banks or deposits or share in savings and loan institutions, credit unions, or money market funds. *29 Del. C. § 5812(p).*
- **“Debt Instrument”** means bonds, notes, debentures, mortgages, or other securities having a fixed yield if not convertible to equity instruments. *29 Del. C. § 5812(e).*
- **“Equity instrument”** means any ownership interest in a corporation or other legal entity giving the rights to the holder upon liquidation of the entity. *29 Del. C. § 5812(f).*

2. Definitions of terms in the remaining sections are in those sections.

**FINANCIAL DISCLOSURE REPORT
(29 Del. C. , Chapter 58, Subchapter II)**

NAME:

BUSINESS ADDRESS:

STATE POSITION:

Section 1. **(See instruction sheet for definitions of underlined terms).** Report any legal or equitable ownership in excess of \$5,000 fair market value or from which income of more than \$5,000 was either derived during the preceding calendar year or might reasonably be expected to be derived during the current calendar year, in the following:

(A) Instruments of Ownership: (name, instrument and nature of ownership, e.g., IBM stock, shareholder).

(B) Business Enterprise: (name, nature of ownership & any position of management, e.g., JW Foods, partnership, director)

(C) Professional Organization: (name, address, type of practice (do not identify individual clients), & any position of management, e.g., ABC Law Firm, 123 Public Rd., Dover, DE, legal services, partner)

(D) Any of the preceding which are constructively controlled. (e.g., ABC Mutual funds, trustee for minor child).

DO NOT LIST: Time or demand deposits or a debt instrument with a fixed yield unless convertible to an equity instrument.

Section 2. List each creditor to whom you were indebted for 90 or more consecutive days during the preceding calendar year in an aggregate amount in excess of \$1,000.

Section 3. If any of the following were received during the preceding calendar year, or reasonably expected to be received during the current calendar year, **list the source**.

- A. **Any** income for services rendered exceeding \$1,000 from a single source, unless reported in Section 1. ("Income for services rendered" includes salary, wages, consulting fees and professional services.) ("Any" is all inclusive so income from the State is also to be listed as a source if received.)
- B. **Any** capital gain exceeding \$1,000 from a single source other than the sale of a residence occupied by the public officer. ("Capital gain" means gains that are reported under Internal Revenue Services laws.)
- C. **Any** reimbursement for expenditures exceeding \$1,000 from a single source; ("Reimbursement for expenditures" means payments to a public officer for expenses incurred by the public officer.)
- D. **Any** honoraria; ("Honoraria" means fees received for speeches, written articles, and participating in discussion groups and similar activities. It does not include reimbursement for expenses.)
- E. **Any** gift with a value in excess of \$250 from any person. **Identify the amount** of each gift. ("Gift" means: payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value unless consideration of equal or greater value is received. "Gift" is not: (1) political contributions otherwise reported as required by law; (2) commercially reasonable loans made in the ordinary course of business; or (3) gifts from: spouse; relatives of the public officer or public officer's spouse within the 3rd degree of consanguinity; or the spouse of any such relative.)

Section 4. Data in this report is provided as of _____.
(Date)

I HEREBY CERTIFY that I have read the foregoing report, and that, to the best of my knowledge and belief, it is true, correct, and complete. I further certify that I have not and will not hereafter transfer any assets, interests or property while retaining an equitable interest therein for the purpose of concealing said assets, interests or property from disclosure.

Public Officer Signature



DELAWARE PUBLIC INTEGRITY COMMISSION

410 Federal St., Suite 3; Dover, Delaware 19901
Phone (302) 739-2399 Fax (302) 739-2398

TO: Elected State Officials/Cabinet Secretaries/Division Directors/Other “Public Officers” and Registered Lobbyists

FROM: State Public Integrity Commission

DATE: March 31, 2003

SUBJ: **Ethics Bulletin 010 - Gift Reporting by Public Officers & Lobbyists**

During the recent financial disclosure reporting period, a number of public officers asked how to properly report: (1) gifts from lobbyists who split the costs of a gift; and (2) gifts if part of the purchase price is designated for a charity. We have addressed those issues for public officers. *Commission Op. Nos. 96-07 & 96-33 (attached)*. However, lobbyists must report expenditures on public officers for gifts, food, entertainment, etc., under a different provision. To the extent the lobbyists’ reporting requirements created confusion, we wish to clarify the issues.

SUMMARY CONCLUSION: For the reasons which follow: (1) public officers must report the full “value of the gift” itself, even if more than one source paid for the gift; (2) lobbyists must affirm to the public officer the full “value of the gift,” even if a lobbyist pays only part of the value; and (3) the “value of a gift” is not reduced if part of the purchase price goes to charity. This ruling is in accordance with the clear statutory language and also with interpretations binding on U.S. Congressional members, officers and employees. *See, Ethics in Government Reporter, U.S. House of Representatives, Committee on Standards of Official Conduct, “Memorandum for All Members, Officers and Employees” (November 14, 2002) at ND-040v, pp. 1-3; Senate Select Committee on Ethics, Senate Ethics Manual, 106th Cong., 2d Sess. (2002) at 24-25.*

(A) Applicable Law

(1) Gift Reporting by Public Officers

Public officers must report: “The **source** of each of the following... Any **gift** with a **value** in excess of \$250 received from any person, identifying also in each case **the amount of each such gift**. The recipient may rely in good faith on the representation of the source as to the **gift’s value**.” 29 *Del. C. § 5813(a)(4)(e)(emphasis added)*.

(2) Expenditure Reporting by Lobbyists

Lobbyists shall report: “for each employer...total expenditures ... for all direct expenditures, **costs or values, whichever is greater** provided for members of the General Assembly or for

employees or members of any state agency... and list the recipient any time expenditures exceed \$50 per diem. Lobbyists shall affirm that he or she provided the recipient of any gift in excess of \$50 with a representation as to the **value of the gift.**” 29 Del. C. § 5835(b) and (c)(emphasis added).

(B) Application of Law to Facts

As lobbying reports are public records, actual reports are used to illustrate the law. Three lobbyists filed reports indicating they gave NASCAR tickets and/or Grand Gala invitations to public officers. Two lobbyists represent Shell Oil. Another represents Motiva. In their quarterly reports to this Commission, each reported spending \$132 on 6/02/03 for NASCAR tickets given to the public officers listed. They affirmed that the officers were advised of the **“gift’s value.”** Each lobbyist sent a separate letter to the public officers identifying the item, date and the \$132 expenditure by that single lobbyist. The letters did not say that each lobbyist was affirming only a **portion** of the “gift’s value.”

(1) Reporting the Source

Public officers must report the “source” of gifts received from any “person.” 29 Del. C. § 5813(a)(4)(e). “Person” means “an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.” 29 Del. C. § 5804(b); 1 Del. C. § 302(16). When multiple sources give a gift, the public officer must report all known sources of that gift. *Commission Op. No. 96-07 & 96-33. (attached).*

A problem arises for public officers in reporting the “source” when each lobbyist sends a separate letter without indicating that the “source” that the lobbyist represents paid only part of the value. Some public officers receive the first letter, and believe the subsequent letters are duplicates. As a result, they do not realize the gift is from more than one source.

(2) Reporting the Value

Lobbyists: Lobbyists must affirm the “value of the gift” to the public officer. In the Shell/Motiva situations, each lobbyist reports their **portion**. Their letters to public officers do not say that the “value” each lobbyist is affirming is only a **portion** of the “value of the gift.”

Public Officers: Public officers also must report the “gift’s value” if it exceeds \$250. Because of the separate letters from each lobbyist, public officers have problems reporting the value. Some base their report of “value” on one letter because they believe the other letters are duplicates: one lobbyist reports his expenditure as \$132, the officer believes he does not have to report the gift as the value is lower than \$250. Some officers realize that three separate lobbyists are reporting, but construe the “value” from each lobbyist as the measure of whether they have to report the item: they see three separate letters with a value reported as \$132, and do not believe they must report any of the three. Other officers see two letters from Shell lobbyists and report the combined total of \$264, but do not realize the Motiva lobbyist paid for one-third of the “gift’s value.” As a result, the public officer does not add \$132 from Motiva, which is less than \$250, to the “gift’s value.”

“Value” is not defined in Title 29, Chapter 58. Under the rules of statutory construction, terms that are not defined by law are given their common and ordinary meaning, and read within their context. *Commission Op. No. 96-07 & 96-33* (citing 1 *Del. C.* § 303). Read within its context, it is the value of the “gift” itself, not how it was paid for, that is reported. A “gift” has the same value whether one person or many paid for it. As both the lobbying and the financial disclosure provisions use the “gift’s value” as the reporting standard, the meaning must be the same for both reports. Thus, when a lobbyist affirms to the public officer only a portion of the “gift’s value,” without indicating that the costs were split, then the lobbyist has not affirmed the “gift’s value.” At a minimum, when costs are split, each lobbyist should affirm to the public officer the amount that lobbyist paid, but clearly identify that it is only a portion of the “gift’s value.”

We noted in our prior ruling, that the reporting provisions are meant to instill public confidence in its government, and to insure there is not even an appearance of impropriety. *Commission Op. No. 96-07 & 96-33*. As noted by the U.S. House Committee on Standards of Official Conduct, the law “cannot be evaded by such devices as dividing the expense of a gift among two or more lobbyists.” It noted that as the requirements were “clearly stated in the gift rule. It is absolute, and cannot be evaded by any artificial devices.” Similarly, Delaware’s law is clear - both public officers and lobbyists are to report the “gift’s value.”

(3) “Value” does not change when part of the costs go to Charity

Organizations sometimes buy tickets to events, such as the Grand Gala, and part of the price paid is designated for charity. We have held that a “gift’s value” is not reduced when part of the price paid is meant for charity. *Commission Op. No. 96-07 & 96-33*. The statute has no exemption to, or change in, “value” when part of the price is meant for charity. *Id.* In interpreting the law, Courts look first to the statutory language. *Goldstein v. Municipal Court, Del. Super., C.A. No. 89A-AP-13, J. Gebelein (January 7, 1991)*. Where the legislature is silent, additional language will not be grafted onto the statute because such action would be creating law. *Goldstein* (citing *State v. Rose, Del. Super., 132 A.2d 864, 876 (1926)*). Thus, the “gift’s value” is what one must pay for a particular event or item. *Commission Op. No. 96-07 & 96-33*. For example, if it costs \$10,000 for a table at an event, and \$5,000 of the purchase price goes to charity, the “value” to the purchaser is still \$10,000. If the purchaser invites 10 people to that table, the “value” to each person is \$1,000. Similarly, if a “per plate” dinner were \$100, and chicken was served, the “value” does not change just because a chicken dinner does not usually cost \$100.

As noted by the House Standards of Conduct Committee, gifts are valued at the amount for which the item or service is available, and the gift laws “cannot be evaded by attributing an improperly low value to a gift.”

The letter of the law requires reporting the “gift’s value” with no exception for possible tax exemptions to a charity. Delaware’s law is meant to avoid even an appearance of impropriety. Thus, we remind public officials, as was done by the House Standards Committee, that they are “to adhere to the *spirit* as well as to the letter” of the law.

This does not stop a lobbyist or public officer from disclosing more information than the law

requires. If, for example, they wish to indicate that the “gift’s value” was \$250, and further disclose that a given portion was designated for charity, they may do so.

Attachment

Gift Reporting for Public Officers Synopsis of Commission Op. Nos. 96-07 & 96-33

Charitable Event and

Out-of-State Conference

A public officer was asked, because of his public position, to participate in a charitable athletic event at no cost to him. The value of being able to participate was approximately \$2,000. Some public officers attended an out-of-state conference which was paid for by a number of entities. The primary sponsor was known to the public officers but not all contributors were known. Although the total cost exceeded \$250, if the costs were split by the entities, none would have paid more than \$250. Are these matters to be reported, and if so, how?

Who is the “source” and what is the “value” of a gift under the Financial Disclosure statute?

The financial disclosure law requires that public officers report:

“The source of each of the following items . . .

Any gift with a value in excess of \$250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance, the recipient may rely in good faith upon the representation of the source of the gift as to the gift’s value. 29 *Del. C.* § 5813(a)(4)(e) (*emphasis added*).

Payment by More than One Entity

The first issue is if “source” is limited to a single entity or encompasses multiple entities. The code does not define source. The Delaware rules of statutory construction require that “words and phrases shall be read within their context and shall be construed according to the common and approved usage of the English language.” 1 *Del. C.* § 303. The common meaning of “source” is “a generative force: cause”; “a point of origin or procurement: beginning” “one that initiates”; “origin.” *Merriam Webster’s Collegiate Dictionary*, p. 1123-24 (10th ed. 1994). While both the language in the statute and the language in the dictionary appear to be phrased in the “singular,” the Delaware rules of construction provide that words used in the singular include the plural and the plural includes the singular. 1 *Del. C.* § 304; *See, State v. Minnick*, Del. Super., 168 A.2d 93 (1960); *State v. Caruso*, Del. Gen. Sess., 32 A.2d 771 (1942); *Application of Pepper*, Del. Gen. Sess., 54 A.2d 173 (1947).

Additionally, elsewhere in the financial disclosure law, the legislature has made it clear when it wished to refer to “a single source.” *See, e.g., 29 Del. C. § 5812 (j)*(income means “income from a single source”); *29 Del. C. § 5813(a)(4)(a)*(income from a “single source”); *29 Del. C. § 5813(a)(4)(b)*(capital gain from a “single source”); *29 Del. C. § 5813(a)(4)(c)*(reimbursement from a “single source”). Had the General Assembly meant for the “source” of gifts to be limited to a “single source,” it could have used such term. *See, General Motors v. IAB, Del Supr., 545 A.2d 1186, 1191 (1988)*(where a provision is expressly included in one section of a statute, but omitted from another, it is reasonable to assume the legislature was aware of the omission and intended it). Also, the statute requires reporting of the source of gifts received from any “person.” In chapter 58, “person” means “an individual, partnership, corporation, trust, joint venture and any other association of individuals or entities.” *29 Del. C. § 5804(6)*; *See also, 1 Del. C. § 302(16)* (in construing all statutes, “person” includes individuals, corporations, etc.) Thus, “source” and “person” can include more than one entity.

What is the “value” when payment is by more than one entity?

The next issue is if “value” is based on the amount paid by each single entity or based on the aggregate amount. The Code provides that “any gift with a value in excess of \$250” is to be reported. *29 Del. C. § 5813(a)(4)(e)*. As indicated above, words and phrases are to be read “in their context.”

1 Del. C. § 303. Read within its context, it is the value of the “gift” itself, not how it was paid for, that is to be reported as the “gift” has the same value whether it is paid for by one person or many. Such interpretation is consistent with the legislative purpose of disclosure. The legislature, in enacting the financial disclosure law, found that:

“[P]ersons serving in State government hold positions of public trust which require rigorous adherence to the highest standards of honesty, integrity and impartiality. In order to insure propriety and preserve public trust, a public official or employee should refrain from acting in his official capacity on any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment, and avoid even the appearance of impropriety. A disclosure of the personal financial interests of public officials will serve to guard against conduct violative of this

public trust and to restore the public's faith and confidence in representatives of its government.” 29 Del. C. § 5811.

If a gift were not reported because more than one entity paid for it, but the gift had a value that might on the face of it “reasonably be expected to impair objectivity,” or if a gift could be accepted and not reported because entities split the costs, the public might well question the point of having a disclosure law, if it could be effectively circumvented to avoid reporting. That would mean gifts that might appear improper or impact on objectivity could conceivably never be disclosed. It is unlikely that interpretation would “restore the public's faith and confidence in representatives of its government.”

Meaning of “Value”

The next issue is another determination of “value.” The situation given pertains to a charitable athletic event such as the McDonald's Open, where a public official may be invited to appear and play golf.

The first question is if the recipient should base the value on the fair market value of being able to play golf at that time and place or whether the value is the amount raised per participant and donated to charity. The Code states that the individual is entitled to rely in good faith on the representation by the source as to the gift's value. 29 Del. C. § 5813(a)(4)(e). The Code does not define “value.”

The rules of statutory construction require that the plain and ordinary meaning of words should be used. 1 Del. C. § 303. “Value” means “a fair return or equivalent in goods, services, or money for something exchanged; the monetary worth of something: marketable price; relative worth, utility or importance.” *Merriam Webster's Collegiate Dictionary*, p. 1305 (10th ed. 1994). Based on the ordinary meaning, the Commission concludes that “value,” under the financial disclosure law, means “marketable price or relative worth.” It would be the value paid. Accordingly, the value of the golf event would be what one would have to pay or contribute to participate in the same event. Thus, the full price of a ticket to play in the Pro-Am portion of the McDonald's golf event is its value, not what one would normally pay in green's fees to play at that course.

Consideration of Equal or

An item is not a gift if “consideration of equal or greater value is

Greater Value

given.” 29 *Del. C.* § 5813(a)(4)(e). The question is whether the public officer’s time attending such charity event, is the requisite “consideration.” The same question applies to the conference: is attendance by General Assembly members and Executive Branch officials the requisite consideration?

“Consideration” generally means that something is given in exchange. 17A *Am.Jur.2d Contracts* §§113 and 114. It means “some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or consideration by the other, as an act of forbearance or the creation, modification, or destruction of a legal relation; or a return promise bargained for and given in exchange for the promise.” 17 *Am.Jur. 2d Contracts* § 85.

Regarding the golfing event, while the Commission appreciates that it is helpful to charities to have political or other “named” personages on hand, it is also an enjoyable, non-governmental activity for the legislator. Without more, there is not “consideration of equal or greater value.”

Regarding the conference, the agenda showed that while there were some meetings, they appeared to be incidental compared to the majority of time which was not devoted to business. While attending the short meetings was “some” consideration, it was not equal to or greater than the value of the gift.

Conclusion

In summary, the conference trip’s value exceeded \$250. The fact it was paid for by several sources who each contributed less than \$250 does not mean it should not be reported, as it is the value of the gift that is reported. As for reporting the “source,” the individual must report all known sources and note the lack of identity of other sources, if they are unknown. If they become known, their identity must reported. And as there was insufficient consideration to remove the trip from the definition of gift, the trip should be reported.

Regarding the golfing event, assuming the cost to participate in the event would be \$2,000, the value exceeds \$250 and would be reported, as there was no consideration of equal or greater value given. (*Commission Op. Nos. 96-07 & 96-33*).

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PLEASE REPLY TO: Civil Division-Kent County (739-7641)

August 21, 2006

Mr. Chris Barrish
Senior Reporter
The News Journal
P.O. Box 15505
New Castle, DE 19850Re: **Freedom of Information Act Complaint**
Against State Public Integrity Commission

Dear Mr. Barrish:

Our Office received your Freedom of Information Act ("FOIA") complaint on July 8, 2006 alleging that the State Public Integrity Commission ("the Commission") violated FOIA by denying you access to lobbying expense reports and financial disclosure reports of public officials in electronic form. 1

FOIA prohibits our Office from investigating "an alleged violation [of FOIA] by an administrative officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to Section 2504 of [Title 29 of the *Delaware Code*]." 29 *Del. C.* §10005(f). The Attorney General's duty to provide legal advice, counsel and services to State agencies and officials "shall not apply to the State Public Integrity Commission." *Id.* § 2515(b).

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By letter dated July 12, 2006, we asked the Commission to respond to your complaint by July 24, 2006. We received the Commission's response on July 24, 2006. We made several requests to the Commission for additional information which we received over the course of July 27- August 7, 2006.

Pertinent Facts

The Commission is required by statute to receive and maintain lobbyist expense reports and financial disclosure reports of public officials. Until 2002, all reports were filed in hard copy and maintained by the Commission in its offices for inspection and copying pursuant to FOIA.

In 2002, the State contracted with a private company, Delaware Digital Management Group ("DDMG"), to create a database system for electronic filing of reports. The database contains the same information as in the hard copy reports with some additional fields (e-mail address, user ID number, and password) for secure electronic filing.

According to the Commission, lobbyists have the option since 2002 to file their expense reports electronically though a few continue to file in hard copy. For lobbyists who file in hard copy, the Commission's staff makes "the data entry for those few forms" into the electronic database. The database is programmed to post the lobbying expense reports on the Commission's website. The reports on the website are arranged by year (back to 2002), quarter, and name (in alphabetical order). By accessing the website, a citizen can use a personal computer to download and print out reports in hard copy.

According to the Commission, starting this year public officials have the option to file financial disclosure reports electronically with a user ID and password; 144 (out of 317) public

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officials filed their 2005 financial disclosure reports in hard copy rather than electronically. For public officials who continue to file reports in hard copy, the Commission scans the reports into PDF files. "Once that conversion is made, we can administratively attach the PDF file to the public officer's file in the [electronic] database. It remains a PDF file, and is identical to the hard copies on file." The Commission does not post any of the information in the financial disclosure reports on its website.

Commission's Legal Position

The Commission contends FOIA does not apply to its electronic database because: (1) FOIA only requires access to records a public body is required by law to maintain, and the Commission is only required by law to maintain reports in hard copy; (2) the Commission provided you with the reports in hard copy and FOIA does not require it to make the same information available to you in electronic form; (3) the Commission is not the custodian of the records you requested because DDMG maintains the electronic database; (4) to provide the electronic data in the form you requested requires computer programming to convert the information to a new format, thereby creating a new public record which FOIA does not require.

Alternatively, if the electronic database is a public record under FOIA, the Commission contends that FOIA exempts from disclosure: (1) DDMG's proprietary software; (2) personal identifiers; and (3) personal financial information in electronic form because of the risk of identity theft.

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RELEVANT STATUTES

FOIA provides: "All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA defines a "public record" as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." *Id.* §10002(g).

FOIA exempts from disclosure "[t]rade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature." *Id.* §10002(g)(2). FOIA also exempts "[a]ny records specifically exempted from public disclosure by statute or common law." *Id.* §10002(g)(6).

Financial disclosure reports which public officers must file with the Commission "shall be made available at reasonable hours for public inspection and copying pursuant to [FOIA]." 29 *Del. C.* §5814(b).

"The lobbyist docket maintained by the Commission and any reports, authorizations or other documents filed with the Commission pursuant to this subchapter shall be made available at reasonable hours for public inspection and copying pursuant to [FOIA]." *Id.* § 5836(b).

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LEGAL AUTHORITY

A. Commission Statute

By statute, the Commission must receive and maintain lobbying expense reports and financial disclosure reports of public officials. *See 29 Del. C. Ch. 58*. The Commission contends it is required to maintain the reports only in hard copy and not in an electronic format. The Commission contends its electronic database is not subject to FOIA because the "Delaware Courts have held that information not mandated by statute is not a 'public record'" (citing *Jacobs v. City of Wilmington*, C.A. No. 18679, 2002 WL 27817 (Del. Ch., Jan 3, 2002) (Strine, V.C.)).

In *Jacobs*, a chiropractor made a FOIA request for traffic accident reports prepared by the Wilmington Police Department. State law (21 Del. C. §4203(d)) requires police to submit traffic reports to the Department of Public Safety for accidents involving an impaired driver, personal injury or death, or apparent property damage of \$1,500 or more. Those reports "shall be for the information of the Department of Public Safety and shall not be open to public inspection." *Id.* § 313(b).

The Wilmington Police Department went beyond the statutory requirements and submitted a report to the Department of Public Safety for every traffic accident, even minor ones. Because the statute did not require the filing of minor accident reports, the chiropractor argued they were not exempt under Section 313(b) but rather public records under FOIA.

The Chancery Court rejected that argument as "inconsistent with the statutory promise of confidentiality for reports of traffic accidents made by drivers under the statutory reporting scheme. I hold that Non-Mandatory Reports are specifically exempted from public disclosure.

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As such, per 29 *Del. C.* §10002(d)(6), they are not public records subject to disclosure under FOIA." 2002 WL 27817, at p.1.¹

Jacobs holds that minor traffic accident reports are not public records under FOIA because they are specifically exempted by another statute. *Jacobs* does not hold that such reports are public records because the police department did not have to prepare them.

The public records law in some states applies only if the records are "required by law" to be created, kept or maintained by the public body.² The definition of a public record under Delaware's FOIA, in contrast, does not turn on whether the public body is required by law to maintain the record. FOIA defines a public record as "information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected." 29 *Del. C.* §10002(g). Like the Maryland Public Information Act, Delaware's FOIA "is not limited to public records which are records required by law to be made, maintained, or kept." *Office of the Governor v. The Washington Post Co.*, 759 A.2d 249, 269 (Md. App. 2000). See also *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578 (N.D. 1981) ("Public records are not limited to those records which are required by law to be kept and maintained.").

¹ The section of FOIA cited by the Chancery Court is now recodified as §10002(g)(6), which provides that FOIA does not apply to "records specifically exempted from public disclosure by statute or common law."

² See, e.g., N.J.Stat. Ann. § 47:1A-2 ("all records which are required by law to be made, maintained or kept on file"); Mo. Ann. Stat. § 575.010(5) ("required by law to keep"); Kan. Stat. Ann. § 45-201(a) ("by law are required to be kept and maintained"); Okla. Stat. 1970 s. 24 ("required by law to keep public records"). But see N.M. Stat. Ann. §14-2-6(E) ("whether or not the records are required by law to be created or maintained").

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The Commission may not be required by law to compile and maintain an electronic database, but once it does the database becomes a public record unless specifically exempted by FOIA.

B. Electronic Records

FOIA requires access to public records "regardless of the physical form or characteristic by which such information is stored, recorded or reproduced." 29 Del. C. §10002(g). FOIA does not make any "distinction between records maintained in manual and computer storage systems." *Att'y Gen. Op.* 97-IB06 (Mar. 17, 1997) (quoting *Yeager v. Drug Enforcement Administration*, 678 F.3d 315, 321 (D.C. Cir. 1982)). *Accord Seigle v. Barry*, 422 So.2d 63, 65 (Fla. App. 1982) ("There can be no doubt that information stored on a computer is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet.").

"Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA. The type of storage system in which the agency has chosen to maintain its records cannot diminish the duties imposed by the FOIA." *Yeager*, 678 F.2d at 321.

According to the Commission, its electronic database "has the same data" as the hard copy reports filed by lobbyists and public officials with "some additional fields" (e.g., user ID, password, e-mail address) created for secure electronic filing. Because you have access to hard copy reports, the Commission contends FOIA does not require it to provide you with the same information in electronic form.

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In *American Federation of State, County & Municipal Employees v. County of Cook*, 555 N.E.2d 361 (Ill. 1990), a union requested names of county employees by department, job title, rate of pay, and work location. The county provided a computer printout of the information. The union then asked for the same information on computer tape or diskette. The county denied the request because it had already provided the same information in hard copy.

Like Delaware's FOIA, Illinois law defines a "public record" to include recorded information "regardless of physical form or characteristics." Ill.Rev.Stat., ch.116, para.202(c). The Illinois Supreme Court held this definition includes "computer tapes within its scope." *AFSCME*, 555 N.E.2d at 364.

The court rejected the argument that the county "may choose the format in which it releases information so long as the requestor is provided reasonable access to the information, regardless of the format that was requested." *Id.* at 365. The public records law "does not state that a public body may reply to information requests by supplying different public records than those for which the requestor asked. Rather, the public body must make the public record available, including computer tapes, unless it can properly invoke an exception." *Id.* at 364. *Accord State ex rel. Margolius v. City of Cleveland*, 584 N.E.2d 665, 669 (Ohio 1992); *Farrell v. City of Detroit*, 530 N.W.2d 105, 109 (Mich. App. 1995); *Brownstone Publishers, Inc. v. New York City Department of Buildings*, 560 N.Y.S.2d 642 (App. Div. 1990).

In *Margolius*, the Ohio Supreme Court made clear "this holding only applies to public records already stored in a tangible medium at public expense. There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records

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in a particular medium in order to provide greater public access to the records." 584 N.E.2d at 670. "Any increased financial burden caused by compliance with this decision can and should be passed on to the party making the request." *Id.* at 669 n.4.

We believe that under Delaware's FOIA an existing electronic database is a public record separate and distinct from the underlying records used to compile the database. Under FOIA, a public body cannot respond to a request for information in electronic form by supplying paper records that contain the same information.

C. Private Custodian

FOIA requires that public records "shall be open to inspection and copying by . . . the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

The Commission contends it is not the custodian of the electronic data you requested because the database was "constructed by a private vendor" (DDMG) and this "database is not on the State's server, but on DDMG's server."

In *State ex rel. Cincinnati Enquirer v. Krings*, 758 N.E.2d 1135 (Ohio 2001) (per curiam), the city contracted with two private companies to construct a new football stadium. The contracts required the companies to maintain cost-accounting records and afford the city access to those records. A newspaper asked the county administrator for construction records to investigate cost overruns on the stadium. The county provided all records physically located in the county administration building but argued that records maintained by the two contractors were not subject to the Ohio Public Records Act.

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The Ohio Supreme Court held the act affords "access to public records, even when a private entity is responsible for the records. . . [G]overnmental entities cannot conceal information concerning public duties by delegating these duties to a private entity." 758 N.E.2d at 1139, 1140. A private entity is subject to the public records law if: "(1) it must prepare the records in order to carry out a public office's responsibilities, (2) the public office must be able to monitor the private entity's performance, and (3) the public office must have access to the records for this purpose." *Id.* at 1140. The terms of the stadium contracts "are sufficiently broad to establish a right of access on the part of the county to the [contractors'] records concerning cost overruns on the public construction project." *Id.*³

The Commission provided us with a sworn affidavit of Alan D. Cole, Chief Technology Officer of Delaware Digital Management Group. According to Mr. Cole, "DDMG is a private company which contracted with the Public Integrity Commission (PIC) to create a database system for electronic filing of financial disclosure reports and lobbying reports." Under the contract, "the PIC Staff will have full administration access to all data within the system." According to DDMG, the "data itself belongs to PIC per the contract" and "the State of Delaware has the right to provide web hosting of this web site at a State facility." The Commission acknowledges it has access to the database to check to make sure that lobbyists and public officials have filed their

³ See also *Harold v. Orange County*, 668 So.2d 1010 (Fla. App. 1996) (the county "delegated to [the contractors] responsibility, on behalf of the County, to assure that the trade contractors comply with the Fairness in Procurement Ordinance and to maintain whatever records are necessary so that the County can verify such compliance."); *Prince George's County v. The Washington Post Co.*, 815 A.2d 859, 885-86 (Md. App. 2003) (a private company "set up the risk management database and fields for the County to be used for the transaction of public business. Therefore, we believe that both are public records and available, absent an applicable exemption, for public dissemination.").

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reports; to review the reports for completeness and accuracy; and to input information from hard copy reports into the electronic database.

We determine that the electronic database maintained by DDMG under contract with the Commission is subject to FOIA.⁴ DDMG maintains the database to help carry out the Commission's statutory responsibility to maintain lobbying expense reports and financial disclosure reports of public officials. The Commission owns the database and has complete right of access to the data even though it is maintained on DDMG's server. The Commission is the custodian of the database for purposes of FOIA because it contains information "owned," "used," or "otherwise compiled and collected" by the Commission. 29 Del. C. §10002(g).

D. Creation of a New Public Record

The Commission contends your FOIA request would require it "to create a new document, developed under Mr. Barrish's specified needs" and FOIA does not require a public body to create a record that does not already exist.

According to the Cole affidavit, you "requested a CVS (which is a comma separated text file) of the tables of the database and the information on lobbying and financial disclosure housed within those tables. The CVS could then be imported into such programs as Access or other relational database systems to make the data searchable." Mr. Cole states that your request would require: "(A) Identifying and blocking tables/columns that contain non-public information such

⁴ This does not mean that DDMG is a "public body" for purposes of FOIA. Because the Commission is the constructive custodian of the records you requested, you do "not have to deal with a private third party in order to gain access to the records." *Krings*, 758 N.E.2d at 1141 (quoting *State ex rel. Recodet Co. v. Buchanan*, 546 N.E.2d 203, 204 (Ohio 1989) (per curiam)).

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as User Ids and passwords; and (B) Converting the existing information from a relational database system into multiple CVS files." Mr. Cole estimates "it would take approximately two days if DDMG put aside the work for its other clients to perform the work requested."

To redact non-public information like user ID numbers and passwords does not amount to creating a new document under FOIA. "The argument that a document with some information deleted is a 'new document,' and therefore not subject to disclosure, has been flatly rejected." *Yeager*, 678 F.2d at 321. "This is true even if all but one or two items of information have been deleted." *Id.*⁵ FOIA, however, does not require "any manipulation or restructuring of the substantive content of a record." *Id.* at 323.

In *Att'y Gen. Op. 04-IB14* (June 28, 2004), our Office determined that FOIA did not require a school district to "produce computerized data in a special format requested by a citizen" through "'a search of the online database, accomplished by entering the requesting party's search criteria'" (quoting *Gabriels v. Curiale*, 628 N.Y.S.2d 882, 883 (App. Div. 1995)). "Nor does FOIA obligate an agency 'to develop a program to accomplish this task for the purpose of complying with [the FOIA] request.'" *Id.*⁶

In *Schulten, Ward & Turner, LLP v. Fulton-DeKalb Hospital Authority*, 535 S.E.2d 243 (Ga. 2000), a law firm requested Medicare information which would require "a computer

⁵ See also *Bowie v. Evanston Community Consolidated School District*, 538 N.E.2d 557, 561 (Ill. 1989) ("Deleting information from a record does not create a 'new' record"); *State ex rel. Stephan v. Harder*, 641 P.2d 366, 374 (Kan. 1982) (the public records law "implies a duty upon the agency to delete confidential and nondisclosable information from that which may be disclosed").

⁶ A public body, however, may have "to develop a special computer program which would delete exempt information." *Hamer v. Lentz*, 547 N.E.2d 191, 195 (Ill. 1989).

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technician [to] extract the requested information from files maintained in the Authority's database." 535 S.E.2d at 245. The Georgia Supreme Court held that FOIA "does not require a public agency or officer to create or compile new records by any method, including the development of a computer program or otherwise having a computer technician search the agency's or officer's database according to criteria conceived by the citizen making the request." *Id. Accord State ex rel. Kerner v. State Teachers Retirement Board*, 695 N.E.2d 256, 258 (Ohio 1998) (per curiam) ("In order to create the requested records, the board would have had to reprogram its computer system. Therefore, the Board had no duty to provide access to the requested records."). ⁷

We determine that FOIA does not require the Commission to convert its electronic database from a relational database into CVS (comma separated) files. That would amount to the creation of a new public record which FOIA does not require. ⁸

E. Exempt Information Under FOIA

The Commission contends that if FOIA requires access to its database, FOIA exempts from disclosure: (1) DDMG's proprietary software; (2) personal identifiers; and (3) personal financial

⁷ In *Kerner*, the Ohio Supreme Court noted that "if the clerk's computer were already programmed to produce the desired printout, the 'document' would already exist for the purpose of a [FOIA] request." 695 N.E.2d at 257.

⁸ We understand you also asked the Commission to scan hard copy reports onto a CD. FOIA does not require the Commission to do so. FOIA only requires a public body to make records "open to inspection and copying." 29 Del. C. §10003(a). FOIA does not require a public body to do the copying itself, though it may choose to for administrative convenience and charge the actual costs of copying. FOIA only requires the Commission to make the hard copy reports available to you to photocopy or scan at your own time and expense.

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information in electronic form.

1. Proprietary Software

The Commission contends the electronic database maintained by DDMG is exempt from disclosure under FOIA "to the extent that the database and its tables are proprietary or trade secrets of the private vendor" (citing 29 Del. C. §10002(g)(2)).

"When a public agency makes a diskette copy for someone, that person will have to have his own software to be able to read the information stored on the diskette. . . By giving out a diskette, the city is not giving out any software. It is only giving out its database files and these files are a public record." *State ex rel. Athens County Property Owners Association*, 619 N.E.2d 437, 439 (Ohio App. 1992).

DDMG has confirmed that copying the electronic database in the format you requested would not infringe on its proprietary software. That software is separate and distinct from "the database itself which stores the data."

We determine that providing you with the reports in the Commission's electronic database maintained by DDMC would not require disclosure of any proprietary software which is exempt as a trade secret under FOIA.

2. Personal Identifiers

According to the Commission, before it decided to allow optional electronic filing of reports by public officials and lobbyists, there were concerns that hackers might try to manipulate the information. To prevent that, the Commission asked DDMG to create tables and fields such as "phone numbers, e-mail addresses, User Identification numbers, and passwords. That

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information is gathered as part of the database program to help insure security and some certainty in who is filing the report. That information is not released to the public to avoid possible tampering with the on-line filing."

We agree that disclosure of personal identifiers like home address and telephone number, e-mail address, user ID number, or password would invade personal privacy and is not essential for government accountability. FOIA allows the Commission to redact direct personal identifiers from the electronic database before making it available to the public.⁹

3. Personal Financial Information

The Commission also wants to redact from the electronic database the names of banks, mutual funds, brokerage firms, creditors, and companies in which a public official owns stock or bonds. The Commission fears that information, in electronic form, might be used for identity theft.

According to the Commission, "we presently make the hard copy reports, even with the personal financial information available, pursuant to a FOIA request, but that is because it then gives us some control over who had access to the information in the event it should be misused." The Commission contends that under FOIA it can withhold that same information in electronic form because "State agencies may limit dissemination of even public records" if widespread dissemination would increase the risk to personal privacy.

⁹ FOIA also allows the Commission to redact bank or other account numbers (to the extent they are listed - the financial disclosure report form does not require them). "Disclosing personal bank account numbers would constitute a clearly unwarranted invasion of personal privacy because this information could be used for nefarious purposes. In addition, there is no public interest in this information." *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp.2d 19, 37 (D.D.C. 2000).

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The Commission contends that the "United States Supreme Court and Delaware Courts have noted the difference between information obtained by going to a Courthouse or office to review bits of information, as compared to gaining information that is in a database. *Board of Managers of the Delaware Criminal Justice Information System v. Gannett Co.*, 808 A.2d 453 (Del. Super. 2002) (citing *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989)). Both courts recognized that even information which is public can take on a more private nature depending on the degree of dissemination."

Computerized databases may enhance the concerns about individual privacy, but the courts in the *DELJIS* litigation did not hold that the entire criminal history database was exempt from disclosure under FOIA, only certain data fields. "[D]isclosure of databases, like any other information, must be looked at on a case-by-case basis, and should only be excluded from FOIA if it falls into one of the enumerated exceptions to FOIA." *DELJIS v. Gannett*, 808 A.2d at 460.

In *Price v. Corzine*, 2006 WL 1080491 (D.N.J., Apr. 20, 2006), the federal district court denied a request to enjoin the posting of financial disclosures on the Internet. The New Jersey Casino Control Act requires casino employees to file an annual financial disclosure statement (FDS) with the Casino Control Ethics Commission listing "all assets and liabilities, property and business interests, and sources of income of said employee or agent and his spouse." N.J. Stat. Ann. §5:12-58(e). By executive order, Governor Corzine required the Ethics Commission to post the financial disclosure statements on its Internet site beginning with statements for 2005.

"Plaintiffs challenge only the online publication of their FDS information. They do not challenge the State's requirement that [casino] employees provide that information, or the

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prevailing practice of making it available for inspection and copying" in hard copy. 2006 WL 1080491, at p.2. The district court noted, however, "that federal courts have upheld the constitutionality of numerous state statutes requiring the disclosure of personal financial information for the purpose of preventing conflicts of interest." *Id.* (and citations therein).

The Third Circuit has "suggested that the online publication of information that is already publicly available, by that fact alone, would not make otherwise permissible conduct unconstitutional." *Id.* at p.3 (citing *A.A. v. New Jersey*, 341 F.3d 206 (3rd Cir. 2003)). "The question was whether the information was entitled to protection and, if so, whether the government's interest in disclosing it outweighed that interest." *Corzine*, 2006 WL 1080491, at p.3.

"The State has a substantial interest in deterring corruption and conflicts of interest among its employees by requiring the disclosure of their financial information," *Id.* at p.4.

In posting the FDS information online, no additional data would be provided beyond what was already available to the public. Indeed, the website would provide *less* information than what was previously available. The Ethics Commission personnel review all FDS information prior to their posting to redact certain personal identifying information, including social security numbers, account numbers and home addresses.

Id. p.5. "The Court also notes that financial disclosure statements are currently available online for a number of other states, including Alabama, Georgia, Connecticut, Hawaii, Iowa, Indiana, Louisiana, Michigan, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota." *Id.*

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If FOIA requires disclosure of financial disclosure reports in electronic form, the Commission contends it should be able to redact two of the three sections of those reports to protect against identity theft: Section 1 (legal or equitable ownership in excess of \$5,000) ; and Section 2 (creditors owed more than \$1,000). That would leave only Section 3 (income, capital gains, reimbursement for expenditures, honoraria, and gifts).

According to the Commission, "[e]ven if hackers do not have an account number, . . . [o]n the financial disclosure reports, they would have the name of the bank where the public officer has an account, and could send a 'phishing' e-mail using that bank and making the e-mail look legitimate. Also, the disclosure reports have information not only on where their assets are located, but also where they have debts, and other information about them, which if someone wanted to steal their identity, they would have lots of information available."

"Phishing" and other forms of Internet identity theft are an unfortunate consequence of the computer age. Yet other states have made financial disclosure information available to the public in electronic form without any evidence that it increases the risk of identity theft for public officials so long as personal identifiers (*e.g.*, home address and telephone number, e-mail address, social security number, and account numbers) are first redacted.

"The State has a substantial interest in deterring corruption and conflicts of interest among [public officials] by requiring the disclosure of their financial information." *Corzine*, 2006 WL 1080491, at p.4. Financial information such as the names of banks, mutual funds, brokerage firms, creditors, and companies in which a public official owns stocks or bonds is essential to the core purpose of requiring financial disclosure by public officials. "[T]he source of the official's

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income and a delineation of investments, is the very type of information that the public has a right to uncover when looking into conflicts of interest." *Archdeacon v. Town of Oyster Bay*, 813 N.Y.S.2d 289, 295 (Supr. 2006).

This information is already available in hard copy to the public for inspection and copying at the Commission's offices. We do not believe that making the same information available in electronic form would so increase the risk to personal privacy as to make the information exempt under FOIA.

We determine that FOIA does not exempt from disclosure in electronic form the information required to be disclosed by public officials in Sections 1 and 2 of the Commission's financial disclosure report forms.

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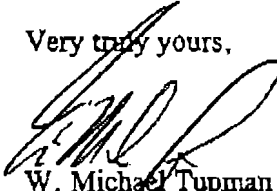
CONCLUSION

For the foregoing reasons, we determine that the Commission violated FOIA by denying you access to lobbying expense and financial disclosure reports in electronic form.

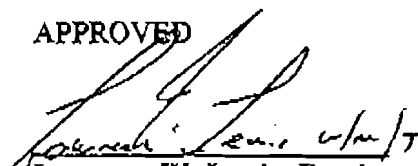
As remediation, we direct the Commission to provide the information contained in those reports to you in the electronic form in which they are currently maintained within twenty days of the date of this letter. The Commission may charge a reasonable cost for redacting direct personal identifiers like home address and telephone number, e-mail address, user ID, or password. The Commission may not redact from the database the information in Sections 1 or 2 of the financial disclosure reports, except for direct personal identifiers like account numbers. The Commission is not required by FOIA to convert the database into the specific format you requested to create a new public record.

The Commission's attorney is directed to report back to our Office in writing within five business days after the Commission completes remediation.

Very truly yours,


W. Michael Tupman
Deputy Attorney General

APPROVED


Lawrence W. Lewis, Esquire
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